

Chicago-Kent College of Law

Scholarly Commons @ IIT Chicago-Kent College of Law

All Faculty Scholarship

Faculty Scholarship

March 1985

Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?

Joan E. Steinman

IIT Chicago-Kent College of Law, jsteinma@kentlaw.iit.edu

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/fac_schol



Part of the [Civil Procedure Commons](#)

Recommended Citation

Joan E. Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 *Hastings L.J.* 1 (1985).

Available at: https://scholarship.kentlaw.iit.edu/fac_schol/591

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?

By JOAN STEINMAN*

In recent years, the United States Supreme Court has been shaping the concept of the public criminal trial.¹ The Court also has expanded rights of access to judicial records and proceedings enjoyed by the public and the press. At the same time, a growing number of federal litigants have sought to sue, or occasionally to be sued, pseudonymously in order to keep their true identities confidential from the public and, in some instances, from their adversaries and the presiding judge.²

The desire to retain anonymity is attributable to a combination of factors. Parties most often seek to sue under fictitious names when the matters in suit are particularly private, stigmatizing, or so unpopular that

* Associate Professor of Law, Illinois Institute of Technology Chicago-Kent College of Law. A.B., 1969, University of Rochester; J.D., 1973, Harvard University. The author thanks Lisa Liewald and Marla Bark, law students at Illinois Institute of Technology Chicago-Kent College of Law, for their research assistance in the preparation of this Article. The author also thanks her colleague, Margaret Stewart, for her insights and suggestions. The subject was suggested to the author by Fidell, *The Strange Case of John Doe: Getting Anonymity in Federal Court*, Nat'l L.J., March 5, 1984, at 20 col.1.

1. See *infra* notes 6-49 & accompanying text.

2. While federal decisions concerning Doe plaintiffs or known Doe defendants are rare prior to 1969, such cases are common now. On the other hand, many federal cases have been filed both before and since 1969 in which defendants were sued pseudonymously due to plaintiffs' ignorance of defendants' names. See generally Note, *Designation of Defendants by Fictitious Names—Use of John Doe Complaints*, 46 IOWA L. REV. 773 (1961); Comment, *Unknown Parties: The John Doe Defendant*, 1970 LAW & SOC. ORD. 256. Problems created by suing defendants pseudonymously, such as the difficulty of determining diverse citizenship for federal jurisdictional purposes under 28 U.S.C. § 1332 (1982), are explored in federal practice treatises. 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 8.10 (2d ed. 1985); 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.74 [6.-7] (2d ed. 1985); 1A J. MOORE, B. RINGLE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶¶ 0.161 [2], 0.168 [3.-2] (2d ed. 1985); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1321 (1969); 7 C. WRIGHT & A. MILLER, *supra*, § 1659 (1972); 14 C. WRIGHT & A. MILLER, *supra*, § 3642 (2d ed. 1985); 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3723 (2d ed. 1985). This Article does not address the problems caused by suing defendants fictitiously because their true names are unknown.

plaintiffs fear retaliation.³ Yet before parties could use pseudonyms to shield their rights to privacy, those rights had to be legally recognized.⁴ Additionally, public law litigators, relying on judicial recognition of privacy interests in unpopular political and social associations,⁵ have attempted to expand the use of pseudonyms from the field of sensitive private disputes to public interest controversies. Accordingly, the use of pseudonyms stems in part from the recent use of the courts by political and social activists seeking judicial intervention in public interest matters.

The apparent tension between these two developments—expansion of public access to the judicial process and the increasing frequency of pseudonymous litigation—raises a number of questions. First, is this apparent tension real in light of the existing and evolving contours of public trial and public rights of access to judicial proceedings and records? Second, under what circumstances should litigants be permitted to keep their identities from the public? Third, what different considerations should influence a litigant's ability to shield his identity from his adversary or the court? Finally, what procedures should govern these decisions?

Despite the large number of cases involving fictitiously named parties, the courts have not yet refined an analysis for determining when litigants may sue or be sued pseudonymously. Nor have courts carefully explored the question of secrecy with respect to an opponent or the court. Additionally, the current ad hoc procedures for handling pseudonymity are unsatisfactory. The purpose of this Article is to provide courts with an analytical framework for resolving these issues. The Article also attempts to sensitize the bar and the judiciary to the first amendment issues raised by the requests for pseudonymous litigation.

First, the Article analyzes the Supreme Court precedent involving public rights of access to criminal proceedings and judicial records, and demonstrates that courts should recognize an equivalent right of access to civil proceedings and records. It then explains the tension between

3. See *infra* notes 181-375 & accompanying text.

4. The development of the right of privacy has been a function of increasing governmental intrusion into traditionally private matters and of the increasing willingness of litigants to protect privacy interests. Fidell, *The Strange Case of John Doe: Getting Anonymity in Federal Court*, Nat'l L.J., March 5, 1984, at 20 col. 1.

5. The Supreme Court has afforded broad protection to these privacy interests. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971); *Roberts v. Pollard*, 393 U.S. 14 (1968) (per curiam); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

pseudonymous litigation and public access rights. Next, the Article proposes a detailed analytical approach for courts to use in determining when pseudonymity should be permitted in civil actions. The Article then illustrates this analysis by examining various categories of cases in which pseudonymity typically has been sought, and evaluates the courts' approaches to those cases. Finally, the Article suggests procedures that should apply to requests for pseudonymity and concludes that litigants sometimes should be permitted to sue, or to be sued, pseudonymously in order to protect security or privacy interests, but that pseudonymous litigation should not be available on demand.

Public Access to Civil Judicial Proceedings and Records

Before evaluating the potential tension between pseudonymous litigation and the public rights of access to judicial records and proceedings, it is necessary to examine the public trial doctrine. The cases dealing with the closure of trials and pretrial hearings are most pertinent. While Supreme Court decisions in this area are confined to criminal cases and thus do not directly address public access to civil litigation and records, the Court's reasoning is nonetheless instructive. In articulating the basis for public access to criminal proceedings, the Supreme Court has focused upon structural constitutional considerations, the common-law tradition of open trials, and the policy grounds for access. As discussed below, these constitutional, historical, and policy considerations also apply to the civil arena.

Constitutional Basis of Access Rights

The Court has held unconstitutional a variety of press and public exclusions from criminal proceedings. The relevance of these decisions to civil litigation depends largely on the constitutional provision upon which the Court relied in upholding access rights. The first amendment,⁶ unlike the sixth amendment,⁷ applies in all litigation, including civil suits. Thus, a right of access based on the first amendment's guarantees has direct implications in the civil arena.

For example, in *Press-Enterprise Co. v. Superior Court*,⁸ a seminal first amendment closure case, the Supreme Court extended the guarantee

6. The first amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

7. The sixth amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" *Id.* amend. VI.

8. 464 U.S. 501 (1984).

of public criminal proceedings to the voir dire examination of potential jurors.⁹ The Court ruled that juror voir dire in a criminal trial must be open unless the closure satisfies a three-part test.¹⁰ First, the party seeking closure must establish an overriding interest that is likely to be prejudiced by an open proceeding.¹¹ Second, closure must be essential and no broader than necessary to preserve that interest.¹² Indeed, the trial court must consider specifically the alternatives to closure and find them inadequate.¹³ Third, the trial court must articulate the overriding interest and make specific findings adequate to support the closure on appeal.¹⁴ *Press-Enterprise* is an important precedent for civil litigation because the Court relied heavily on the first amendment in reaching its decision.¹⁵

9. *Id.* at 505.

10. *Id.* at 508.

11. *Id.* at 510-11.

12. *Id.* at 511-12.

13. *Id.* at 511.

14. *Id.* at 513; see also *Waller v. Georgia*, 104 S. Ct. 2210, 2216 (1984). In *Press-Enterprise*, all but three days of a six-week voir dire had been closed to the public. The trial court also had denied media requests for the transcript. The Court held that the trial court's findings failed to show that an open proceeding would have threatened either the defendant's sixth amendment right to a fair trial or the potential jurors' legitimate privacy interests. The lower court erred also by sealing more of the transcript than was necessary to protect the privacy of the jurors, by failing to explain why withheld material was entitled to protection, and by failing to consider such alternatives as disclosing sensitive voir dire answers to the press without juror identification. *Press-Enterprise*, 464 U.S. at 510-13. The trial court's failure to consider alternatives to closure rendered its order unconstitutional. For further discussion of *Press-Enterprise*, see generally Note, *Access to Pretrial Documents Under The First Amendment*, 84 COLUM. L. REV. 1813 (1984).

15. Actually, the Court hedged in specifying the constitutional source of the right to openness:

For present purposes, how we allocate the "right" to openness as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.

Press-Enterprise, 464 U.S. at 508.

The Court's primary reliance upon the first amendment, however, is suggested by several facts. First, the Court stated that the question being addressed "focuses on First, rather than Fifth, Amendment values and the historical backdrop against which the First Amendment was enacted." *Id.* at 509 n.8. Second, it was at the insistence of a press organization, not at the request of the defendant, that the Court found the trial court's closure of voir dire unconstitutional. Although the press can assert first amendment rights, there is no reason to believe it was being permitted to assert the defendant's fifth amendment right to due process or sixth amendment right to a public trial. As Justice Stevens noted: "[i]f the *defendant* had advanced a claim that *his* Sixth Amendment right to a public trial was violated by the closure of the *voir dire*, it would be important to decide whether the selection of the jury was a part of the 'trial' within the meaning of that Amendment." *Id.* at 516 (Stevens, J., concurring) (emphasis added); see also *id.* at 518 n.5 (Stevens, J., concurring). However, because the Court did not

Later, in *Waller v. Georgia*,¹⁶ the Court unanimously held that closure of an entire suppression hearing over the defendants' objection violated their sixth amendment rights to a public trial. The Court concluded that this sixth amendment right extends to pretrial suppression hearings,¹⁷ and that any closure of a suppression hearing over the objection of the accused must meet the tests set out in *Press-Enterprise*.¹⁸ The closure in question failed these tests.¹⁹

Waller is not at first blush a useful precedent in the civil arena because it was decided under the sixth amendment, which applies only to criminal prosecutions. The *Waller* Court, however, noted that it recently had found that the press and the public had a qualified first amendment right to attend criminal trials, including voir dire, and remarked that "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."²⁰ Although the Court declined to discuss the *Waller* defendants' first amendment claim to an open trial,²¹ this language certainly suggests that several of the Justices would, if necessary, find a qualified first amendment right of public access to pretrial suppression hearings.²² Thus, *Waller* is also useful as a precedent in the civil

reach the question raised by Justice Stevens, it apparently did not rely on a sixth amendment analysis. Finally, none of the justices took issue with Justice Stevens' emphasis upon the first amendment roots of the Court's decision. He placed the case among those that protect free public discussion of governmental affairs, as a guarantee that individuals can participate in government. *Id.* at 516-18 (Stevens, J., concurring).

The precise constitutional source of the Court's decision is important because, as already noted, the first amendment analysis applies directly to civil trials, while the sixth amendment analysis applies only by analogy. *See supra* notes 6-7 & accompanying text. The first amendment as a basis for a right of access will be discussed in detail *infra* text accompanying notes 35-49.

16. 104 S. Ct. 2210 (1984).

17. *Id.* at 2214-16.

18. *See supra* text accompanying notes 10-14.

19. The trial court had closed an entire seven-day suppression hearing to everyone except witnesses, court personnel, the parties, and the lawyers when less than two and one-half hours were actually spent playing recorded telephone conversations mentioning nonparties. *Waller*, 104 S. Ct. at 2213. The prosecutor had expressed concern that unnecessary "publication" would render the tapes inadmissible under state law. *Id.* The Georgia Supreme Court had relied on the "essentially identical interest in protecting the privacy of persons not before the court" to justify the closure. *Id.* at 2216. The Court found that the closure was far more extensive than necessary and that the trial court had failed to consider reasonable alternatives to closure. *Id.* at 2216-17. The Court stated that the privacy of persons not before the court may justify closing portions of a suppression hearing, but indicated that an insufficient showing of need had been made here. *Id.*

20. *Id.* at 2215.

21. *Id.* at 2216 n.6.

22. Such a finding would be necessary when the public or press, rather than the accused, challenged closure, and the Court refused to allow the public or press to assert the defendant's

arena.

Two other recent Supreme Court cases also relied on the first amendment in overturning exclusions of the public and press from criminal trials. First, in *Globe Newspaper Co. v. Superior Court*,²³ the Court held unconstitutional a Massachusetts statute excluding the press and general public from the courtroom during the testimony of minor victims of specified sexual offenses. The Court found that a right of access to criminal trials was implicit in the first amendment, because such a right is necessary to the enjoyment of the first amendment right to informed "discussion of governmental affairs."²⁴ The Court agreed that protecting a minor from the physical and psychological trauma of testifying before the press and the general public was a compelling interest.²⁵ That inter-

sixth amendment right to a public trial. As it happens, the Court recently has granted certiorari in a case that raises the question of whether the public's first amendment right of access to criminal proceedings extends to preliminary hearings. *Press-Enterprise Co. v. Superior Court*, 37 Cal. 3d 772, 691 P.2d 1026, 209 Cal. Rptr. 360 (1984), *cert. granted*, 54 U.S.L.W. 3244 (U.S. Oct. 15, 1985) (No. 84-1560). The Court traditionally has held that the sixth amendment right to a public trial belongs exclusively to the accused. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-81 & n.9 (1979); *In re Oliver*, 333 U.S. 257, 270 & n.25 (1948); *see* *Estes v. Texas*, 381 U.S. 532, 538 (1965); *id.* at 583 (Warren, C.J., concurring); *id.* at 588 (Harlan, J., concurring). The Court recognizes, however, that there may be an independent public "interest" in the public trial guarantee. *See Waller*, 104 S. Ct. at 2216 n.5 ("To the extent there is an independent public interest in the Sixth Amendment public-trial guarantee . . . it applies with full force to suppression hearings."); *Gannett*, 443 U.S. at 383 ("[T]here is a strong societal interest in public trials."); *id.* at 406-07, 412-33 (Blackmun, Brennan, Marshall, & White, JJ., concurring and dissenting) (Interests of the public and the press in open judicial proceedings exist separately from the interests of the accused as a sixth amendment concern.).

23. 457 U.S. 596 (1982).

24. *Id.* at 604-05. The *Globe Newspaper* Court explained that the constitutional right of access is not absolute:

But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. at 606-07.

25. *Id.* at 607. By contrast, the Court found that the interest in encouraging minor victims of sex crimes to come forward and to provide accurate testimony was unsupported empirically as a ground for mandatory closure. *Id.* at 609. Moreover, the Court concluded that closure was an ineffective means of advancing that interest. *Id.* at 610. The Court was also concerned that this interest could be relied upon to support an array of mandatory closure rules. Such an array would pose too great a threat to the "presumption of openness [which] inheres in the very nature of a criminal trial under our system of justice." *Id.* at 610 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion)); *see* *McKeiver v. Pennsylvania*, 403 U.S. 528, 555-57 (1971) (Brennan, J., concurring and dissenting). In *McKeiver*, Justice Brennan concluded that due process in juvenile delinquency proceedings does not require the states to provide jury trials so long as the interests served by jury trials are otherwise protected. *Id.* at 554. When no statutory ban on public admission to juvenile trials existed, and when the record did not indicate that persons the accused sought to

est, however, did not justify a mandatory closure rule.²⁶ The Court held that narrow tailoring requires the trial court to determine on a case by case basis whether closure is necessary, after press and public representatives have had an opportunity to be heard on the question of their exclusion.²⁷

Two years earlier, in *Richmond Newspapers, Inc. v. Virginia*,²⁸ seven Justices for the first time concluded that the first amendment guarantees the public and press a right to attend criminal trials.²⁹ As a result, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."³⁰ The opinion reversed a closure order in which the trial judge had made no findings to support closure and had not considered whether alternatives, such as the exclusion of witnesses from the courtroom or the sequestration of the jurors, would have sufficed to ensure the defendant's sixth amendment right to a fair trial.³¹

Finally, in *Gannett Co. v. DePasquale*,³² the Court held that the press did not have a sixth amendment right to insist upon a public trial

have admitted were excluded, Justice Brennan agreed with the majority's affirmance of the judgment. When state law permitted or required exclusion of the general public and when the trial court had closed the juvenile trial, Justice Brennan would have reversed the judgment. *Id.* at 556-57. For further discussion of *Globe Newspaper*, see generally Comment, *The First Amendment Right of Access to Civil Trials after Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286 (1984) [hereinafter cited as Comment, *Right of Access to Civil Trials*]; Comment, *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. PA. L. REV. 1163 (1984) [hereinafter cited as Comment, *Right of Access to Judicial Disciplinary Proceedings*].

26. *Globe Newspaper*, 457 U.S. at 607 & n.19, 609 & n.25.

27. *Id.* at 609 & n.25.

28. 448 U.S. 555 (1980) (plurality opinion).

29. *Id.* at 575-80; *id.* at 582 (White, J., concurring); *id.* at 582-84 (Stevens, J., concurring); *id.* at 585-98 (Brennan & Marshall, JJ., concurring); *id.* at 599-600 (Stewart, J., concurring); *id.* at 604 (Blackman, J., concurring). In addition, Justice Powell, who took no part in the consideration or decision of this case, already had adopted this position in *Gannett Co. v. DePasquale*, 443 U.S. 368, 397-401 (1979) (Powell, J., concurring).

30. *Richmond Newspapers*, 448 U.S. at 581.

31. *Id.*; see also *In re Oliver*, 333 U.S. 257, 266-73 (1948) (The secrecy of petitioner's trial for criminal contempt violated the due process clause of the fourteenth amendment.); cf. *Lewine v. United States*, 362 U.S. 610, 615-19 (1960) (Exclusion of the public when defendant, who did not request that the courtroom be opened, was adjudged guilty of criminal contempt and sentenced did not invalidate his conviction.). For discussion of *Richmond Newspapers*, see generally BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311 (1982); Cox, *The Supreme Court, 1979 Term Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 20-26 (1980); Fenner, Cox & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415 (1981); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 149-59 (1980).

32. 443 U.S. 368 (1979).

or to attend pretrial proceedings.³³ In *Gannett*, a pretrial suppression hearing was closed to the public and press at the unopposed request of defense attorneys. The Court also held that, in denying access, the trial court had given all appropriate deference to any first amendment rights of the public and press.³⁴

To the extent the Court has recognized a first amendment basis for public and press access to criminal proceedings, its reasoning also provides a constitutional basis for access to civil proceedings because of that amendment's structural role. In *Richmond Newspapers*, the Court reasoned that the freedoms expressly guaranteed by the first amendment share a "core purpose of assuring freedom of communication on matters relating to the functioning of government."³⁵ The conduct of criminal trials is an aspect of government that is of great public concern.³⁶ Cases prohibiting governmental restriction of information³⁷ and recognizing a right to receive information and ideas³⁸ imply that the guarantees of speech and press "prohibit government from summarily closing court-

33. *Id.* at 391. It appears that the Court does not adhere to this view. The opinion of a unanimous Court in *Waller* stated that "[t]o the extent there is an independent public interest in the Sixth Amendment public-trial guarantee . . . it applies with full force to suppression hearings." *Waller*, 104 S. Ct. at 2216 n.5.

34. In reaching this conclusion, the Court relied on three factors: the trial court afforded *Gannett* the opportunity to argue against closure; the trial court balanced the first amendment right of access against the defendants' sixth amendment right to a fair trial; and the temporary nature of the denial of access because a transcript of the suppression hearing was made available. *Id.* at 392-93. For discussion of *Gannett*, see generally Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 (1978); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 62-72 (1979). Subsequent cases, however, question *Gannett's* continued vitality. See, e.g., *Waller*, 104 S.Ct at 2216 n.5 (suggesting that the Court would recognize a first amendment right of access to suppression hearings); *Globe Newspaper*, 457 U.S. at 604-05.

35. *Richmond Newspapers*, 448 U.S. at 575.

36. *Id.*; see *id.* at 604 (Blackmun, J., concurring).

37. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 19-38 (1978) (Stevens, J., dissenting) (Jail policies prohibiting news media from inspecting part of the prison abridges freedom of speech.); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (statute prohibiting corporation from communicating to the public its views on referendum subjects that did not materially affect the corporation's business or property impermissible prohibition of speech); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (attorneys' constitutional right to advertise their prices for routine legal services); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (Brennan, Marshall, & Powell, JJ., dissenting) (Federal Bureau of Prisons' absolute bar against personal interviews between designated inmates and news media impermissibly burdens first amendment protections.).

38. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (First amendment protection for advertisers wishing to disseminate prescription drug price information can also be asserted by consumers as recipients of such information.); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (A statute permitting the government to hold "communist political propaganda" that arrives in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an unjustifiable burden on the addressee's first amendment rights.).

room doors which had long been open to the public at the time that [the first] Amendment was adopted.”³⁹ The reason was simple: “The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily.”⁴⁰

In sum, the administration of justice concerns all citizens, as judicial proceedings are governmental activities, and in this country the citizenry is the final judge of governmental conduct.⁴¹

The *Richmond Newspapers* plurality also invoked the express first amendment right of assembly, “an independent right but also . . . a catalyst to augment the free exercise of the other First Amendment rights.”⁴² It argued that “a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.”⁴³

Justice Stevens, concurring, emphasized the first amendment’s societal function in preserving not only unfettered, but informed, public debate.⁴⁴ “Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance. For that reason information gathering is enti-

39. *Richmond Newspapers*, 448 U.S. at 576.

40. *Id.* at 576-77. This view of open trials was articulated by Justice Brennan in his concurring opinion:

[T]he trial . . . plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*. . . . Thus, so far as the trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.

It follows that the conduct of the trial is pre-eminently a matter of public interest.

Id. at 595-96 (Brennan, J., concurring) (emphasis in original). Justice Brennan elaborated: The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to be discerning, to exercise judgment, and to prescribe rules. Indeed, at times judges wield considerable authority to formulate legal policy in designated areas.

Id. at 595 n.20. The pronouncement of pure common law is, of course, equally the making of law.

41. See *Globe Newspaper*, 457 U.S. at 606 (“[P]ublic access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.”); see also *supra* text accompanying notes 23-27.

42. *Richmond Newspapers*, 448 U.S. at 577.

43. *Id.* at 578 (footnote omitted); see *id.* at 599-600 (Stewart, J., concurring).

44. *Id.* at 584 (Stevens, J., concurring) (incorporating by reference part of his dissenting opinion in *Houchins v. KQED, Inc.*, 438 U.S. 1, 31-32 (1978)).

tled to some measure of constitutional protection."⁴⁵ Justices Brennan and Marshall strongly supported this position, characterizing it as the structural role of the first amendment in securing and fostering our system of self-government.⁴⁶

Finally, in *Press-Enterprise*, Justice Stevens, in his concurrence, again emphasized the first amendment's structural role: "It follows that a claim to access cannot succeed unless access makes a positive contribution to this process of self-governance. Here, public access cannot help but improve public understanding of the voir dire process, thereby enabling critical examination of its workings to take place."⁴⁷

When one isolates the Court's reasons for access to criminal proceedings, it becomes clear that they support a first amendment guarantee of access to civil proceedings. Civil litigation is an equally significant sphere of government and lawmaking. Indeed, the decisions of civil courts affect many more of us in our daily affairs than do decisions in criminal matters. Whether the decision relates to a matter of private law, such as contracts or torts, or to a matter of public law, in which government regulation or constitutional rights are at issue, all Americans have an interest and a stake.⁴⁸ As genuine governmental proceedings, the conduct of civil trials is plainly a matter of enormous public interest. Such trials also must be kept accessible so that the express first amendment rights of speech, press, and assembly will maintain their meaning. Thus, the structural function of the first amendment in securing and fostering self-government is equally applicable to the realm of civil litigation.⁴⁹

45. *Houchins v. KQED, Inc.*, 438 U.S. 1, 32 (1976) (footnote omitted); see *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (Powell, J., dissenting); see also *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting). ("News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist."). See generally A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).

46. *Richmond Newspapers*, 448 U.S. at 587-88 (Brennan & Marshall, JJ., concurring); see also *Globe Newspaper*, 457 U.S. at 604-05. In *Globe Newspaper*, the Court relied heavily upon the reasoning in *Richmond Newspapers*. In explaining why the first amendment affords a right of access to criminal trials, the Court particularly stressed the role of public access in a self-governing society. *Id.* at 604.

47. *Press-Enterprise*, 104 S. Ct. at 828-29 (Stevens, J., concurring).

48. Decisions of public law issues directly affect masses of people. Even decisions of private law issues affect many people through the operation of stare decisis.

49. See generally Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1899-1909, 1921-23 (1978) [hereinafter cited as Note, *Trial Secrecy*]; Comment, *Right of Access to Civil Trials*, *supra* note 25, at 297-98. For other legal commentary in accord with this conclusion, see generally Fenner, Cox & Koley, *supra* note 31, at 430-32; Note, *After Richmond Newspapers: A Public Right to Attend Civil Trials?*, 4 COMM/ENT L.J. 291 (1982); Comment, *All Courts Shall Be Open: The Public's*

The Common Law Tradition of Open Trials

The Supreme Court has recognized that the tradition of open trials derives from both English common-law and American legal history. In *Gannett Co. v. DePasquale*,⁵⁰ for example, the Supreme Court found that history demonstrates the existence of a common-law rule of open criminal trials.⁵¹ Significantly, the Court also recognized the historical existence of a common-law rule of open *civil* proceedings.⁵² Citing seventeenth-century commentators, the Court observed that both civil and criminal trials traditionally have been open to the public: "English commentators . . . assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two The experience in the American Colonies was analogous. From the beginning, the norm was open trials."⁵³ The Court concluded that "there is no principled basis upon which a public right of access to

Right to View Judicial Proceedings and Records, 52 TEMP. L.Q. 311, 311-16, 320-22 (1979). For an argument that the historical and structural emphases suggest different conclusions when applied to the right of access to pretrial documents, see Note, *supra* note 14, at 1828.

Indeed, very recently several federal courts of appeal have begun to recognize expressly a constitutional right of access to civil litigation. See, e.g., *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984). In *Publicker*, plaintiff newspapers appealed from orders closing to the press and public a hearing on preliminary injunction motions, sealing portions of the closed hearing transcript relating to confidential information, and ordering the newspapers' counsel not to disclose this information to their clients, even though the party seeking confidentiality had revealed the information in its opposition memorandum. The Third Circuit reversed the district court's orders. *Id.* at 1061.

The court first held that the newspapers had a common-law right of access to civil trials, *id.* at 1067, but it rested its decision on the first amendment. Based on English and American legal history, on the values served by openness, and on the important role played by access to civil trials in the free discussion of government affairs, the court concluded, as does this Article, that "the public right of access to civil trials is inherent in the nature of our democratic form of government." *Id.* at 1068-70. Following the Supreme Court's lead in *Press-Enterprise*, the Third Circuit also discussed the qualified nature of the right of access as a right that may be limited when an overriding interest in closure is demonstrated, supported by findings, and when the closure imposed is narrowly tailored to meet that overriding interest. *Id.* at 1071. Under this test, the Third Circuit reversed the trial court. *Id.* at 1073-74.

For additional cases inferring a right of access to civil proceedings, see *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1984) (Holding that the first amendment right of public access extends to contempt hearings which are partly civil, partly criminal, in nature.); *Newman v. Graddick*, 696 F.2d 796, 800-02 (11th Cir. 1983) (Civil trials, pertaining to the release or incarceration of prisoners and to the conditions of their confinement, are presumptively open to the press and public.).

50. 443 U.S. 368 (1979).

51. *Id.* 384-91. The Court found, however, that history failed to demonstrate either a common-law right to attend pretrial criminal proceedings or the framers' intent to create a sixth amendment right to attend criminal proceedings, enforceable by third parties. *Id.* at 385-87.

52. *Id.* at 386 n.15.

53. *Id.*

judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than [by] the text and structure of the Constitution."⁵⁴

While the *Gannett* Court declined to elevate the common-law right of public access to a constitutional level,⁵⁵ its historical observations are important. In later cases, the Court relied heavily upon this English and colonial history to find an implicit first or sixth amendment right of public and press access to criminal proceedings. In *Richmond Newspapers, Inc. v. Virginia*,⁵⁶ for example, the plurality opinion described at length the ancient history of open trials, criminal and civil, in Anglo-American justice.⁵⁷ The Court then stated that

[t]he Bill of Rights was enacted against this backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chuse to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." . . . [T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing court-room doors which had long been open to the public at the time that Amendment was adopted.⁵⁸

In his concurring opinion, Justice Brennan similarly emphasized the constitutional significance of this history:

[T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience.⁵⁹

Although the question of public access to civil cases was not raised in *Richmond Newspapers*, the Court volunteered that historically, civil

54. *Id.*; see also *id.* at 418-21 (Blackmun, Brennan, Marshall & White, JJ., concurring and dissenting) (arguing that the tradition of conducting proceedings in public came about as an inescapable concomitant of trial by jury). Juries were typical of the civil, as well as the criminal, courts. See *id.* at 420.

55. *Id.* at 384, 386 n.15. The Court left open the question of whether the first amendment guarantees the public or press a right to attend criminal trials in the absence of a significant governmental interest. The Court noted that, in earlier cases concerning access to prisons, some Justices opined that the first amendment guarantees the public and press a right of access that precludes their complete exclusion in the absence of a significant governmental interest. *Id.* at 391-92; see *Houchins v. KQED, Inc.*, 438 U.S. 1, 27-34 (1978) (Stevens, J., dissenting); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 857, 859-64 (1974) (Powell, J., dissenting). For a discussion of these cases, see *supra* note 37.

56. 448 U.S. 555 (1980).

57. *Id.* at 564-75.

58. *Id.* at 575-76 (citation omitted).

59. *Id.* at 589 (Brennan, J., concurring).

and criminal trials have been presumptively open.⁶⁰ Justice Stewart went further, explicitly opining that the first amendment clearly gives the press and public a right of access to trials, civil as well as criminal.⁶¹

In *Globe Newspaper Co. v. Superior Court*,⁶² the Court again relied upon history in interpreting the first amendment to embody a public right of access to criminal trials.⁶³ Similarly, in *Press-Enterprise* the Court prominently used history in construing the public trial guarantee of the first amendment.⁶⁴ Given the Court's acknowledgement of the parallel history of openness in civil trials, these cases all strongly imply the existence of a historical public right of access to civil trials.⁶⁵

The Shared Policy Grounds for Openness

The policies served by openness are as important to the Court's criminal access cases as the common-law tradition. This section first describes those policies identified by the Court, some of which involve effective judicial administration, and then evaluates their relevance to civil proceedings.

First, public scrutiny protects against judicial abuse. The right to a public trial is "a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."⁶⁶ This right is aimed at assuring a fair trial,⁶⁷ predicated upon the belief that "the presence of interested spectators will keep the triers keenly alive to their sense of responsibility and to the importance of their functions."⁶⁸ Thus,

60. *Id.* at 580 n.17.

61. *Id.* at 599 (Stewart, J., concurring).

62. 457 U.S. 596 (1982).

63. *Id.* at 604-05 (quoting with approval *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)).

64. *Press-Enterprise*, 464 U.S. at 505-08.

65. See also *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1595 (1984). But cf. *Globe Newspaper*, 457 U.S. at 611 (O'Connor, J., concurring) ("I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials."). See generally Comment, *Right of Access to Civil Trials*, *supra* note 25, at 294-96 (Both historical and contemporary practice support constitutional right to attend civil trials.).

66. *Gannett*, 443 U.S. at 380 (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)). Similarly, open proceedings help to protect the courts from false allegations of dishonesty. *Richmond Newspapers*, 448 U.S. at 569 n.7.

67. *Richmond Newspapers*, 448 U.S. at 569; *Estes v. Texas*, 381 U.S. 532, 538-39 (1965) (A public trial guarantees that the accused is fairly dealt with and not unjustly condemned.); *id.* at 583 (Warren, C.J., concurring); *In re Oliver*, 333 U.S. 257, 270 n.25 (1948).

68. *In re Oliver*, 333 U.S. 257, 270 n.25 (1948) (quoting T. COOLEY & W. CARRINGTON,

openness to the public plays "a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence."⁶⁹ The public trial also protects the integrity of the trial by guarding against corruption, bias, or partiality on the part of the court.⁷⁰

Public scrutiny does not restrain only judicial abuse or laxity. In the criminal field, open judicial processes also deter prosecutorial and police misconduct or incompetence. Justice Blackmun has stated that

[t]rials and particularly suppression hearings typically involve questions concerning the propriety of police and government conduct that took place hidden from the public view. Any interest on the part of the prosecution in hiding police or prosecutorial misconduct or ineptitude may coincide with the defendant's desire to keep the proceedings private, with the result that the public interest is sacrificed from both sides.⁷¹

Second, the openness of criminal adjudications also promises to "improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, [and] cause all trial participants to perform their duties more conscientiously."⁷² These desirable consequences

CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927)); see *Richmond Newspapers*, 448 U.S. at 569.

69. *Richmond Newspapers*, 448 U.S. at 593 (Brennan, J., concurring). Of course, when an accused seeks to have criminal proceedings closed to the public, it is not his sixth amendment right to a public trial that a court is protecting by requiring open proceedings. Rather, it is the first amendment guarantees of speech and press that have been relied upon in denying or disapproving closure in those cases. *E.g., id.* at 557-78.

70. *Id.* at 569; *Gannett*, 443 U.S. at 422 (citing M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 344 (6th ed. 1820)) ("if the judge be partial, his partiality and injustice will be evident to all by-standers"); *Gannett*, 443 U.S. at 428 (Blackmun, J., concurring and dissenting).

71. *Gannett*, 443 U.S. at 428 (Blackmun, J., concurring and dissenting); see also *Waller*, 104 S. Ct. at 2216 ("The public . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny."); *Gannett*, 443 U.S. at 445 (Blackmun, J., concurring and dissenting) (prosecutor may fear reversal if he successfully resists closure, or may improperly resist closure in order to disseminate prejudicial information about an accused). Only an informed citizenry can intelligently keep public servants accountable through the ballot box or otherwise. *Id.* at 428-49 (Blackmun, J., concurring and dissenting) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975)). The fact that courts, judges, prosecutors, and sometimes defense attorneys are publicly funded supports the conclusion that the public has the right to ascertain by personal observation whether these participants in the criminal process are acting competently and responsibly. See *Gannett*, 443 U.S. at 432 n.12 (Blackmun, J., concurring and dissenting) (citing *Commercial Printing Co. v. Lee*, 262 Ark. 87, 553 S.W.2d 270 (1977)).

72. *Gannett*, 443 U.S. at 383; see *Waller*, 104 S. Ct. at 2215 & n.4; *Press-Enterprise*, 464 U.S. at 520 (Marshall, J., concurring); *Richmond Newspapers*, 448 U.S. at 569 & n.7; *id.* at 596-97 (Brennan, J., concurring) (commenting upon the several benefits of accurate fact finding, and quoting as still valid 3 W. BLACKSTONE, COMMENTARIES *373: "[O]pen examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the

advance both society's and the accused's interests in fair proceedings that reach "correct" results based on truthful, complete facts⁷³ and on excellent legal arguments, rulings, and instructions.

Third, openness also promotes public respect for and confidence in the judicial system:

The ability of the courts to administer criminal laws depends in no small part on the confidence of the public in judicial remedies, and on respect for and acquaintance with the processes and deliberations of those courts Anything that impairs the open nature of judicial proceedings threatens to undermine this confidence and to impede the ability of the courts to function.⁷⁴

By allowing the public and press to see that defendants are treated fairly and not unjustly condemned, the system is strengthened.⁷⁵ Openness thus promotes both the appearance and the reality of fairness.

Fourth, openness of the criminal justice system has therapeutic value for the community. As Chief Justice Burger recently wrote for a unanimous Court in *Press-Enterprise*:

Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community⁷⁶

clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal."); *Gannett*, 443 U.S. at 421-22 (Blackmun, J., concurring and dissenting). The Supreme Court has recognized that in particular cases, the openness of criminal adjudications may make some individuals reluctant to come forward and testify. *Globe Newspaper*, 457 U.S. at 610. However, in *Globe Newspaper*, the most pertinent case presented to the Court, the majority rejected the contention that automatic closure would increase the number of victims coming forward to testify, finding it to be "speculative in empirical terms, . . . [and] open to serious question as a matter of logic and common sense." *Id.* at 609-10.

73. *Globe Newspaper*, 457 U.S. at 606; *Gannett*, 443 U.S. at 428 (Blackmun, J., concurring and dissenting).

74. *Gannett*, 443 U.S. at 429 (Blackmun, J., concurring and dissenting) (citation omitted).

75. See *Press-Enterprise*, 464 U.S. at 508; *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 570-72; *id.* at 594-95 (Brennan, J., concurring). In his concurrence in *Richmond Newspapers*, Justice Brennan stated:

For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity . . . mandates a system of justice that demonstrates the fairness of the law to our citizens. One major function of the trial . . . is to make that demonstration

Secrecy is profoundly inimical to the demonstrative purposes of the trial process. *Id.*; see also *In re Oliver*, 333 U.S. 257, 270 n.24 (1948).

76. *Press-Enterprise*, 464 U.S. at 508-09 (citation omitted); see *Richmond Newspapers*,

The policy grounds underlying open criminal trials also favor open civil proceedings. Characteristically, no person is accused of a crime in civil litigation; defendants⁷⁷ do, however, stand accused of committing or threatening civil wrongs—breaking contracts, violating civil statutory duties, or abridging constitutional rights—to the detriment of one or many individuals. Similarly, in civil litigation no one's life is at risk and imprisonment is not in the civil court's remedial arsenal.⁷⁸ To a lesser degree, however, litigants' freedom of action, or liberty, is subject to court orders for injunction or specific performance, and defendants' property is very much at risk. When the defendant is the government, the expenditure of public funds may be in issue. Thus, in the civil realm, as in the criminal, a great deal may be at stake.

As in the criminal realm, the judicial system seeks to assure civil litigants a fair and accurate determination of the relevant facts and the governing law. Public scrutiny serves these interests. It is in the interest of effective and proper judicial administration that defendants not be "persecuted," and that no litigant be victimized by abuses of judicial power. Accordingly, an open trial—in which the presence of interested spectators will keep the triers sensitive to their responsibilities—is a basic safeguard against possible abuse of judicial power in civil as well as in criminal litigation.

Although civil proceedings ordinarily do not afford the public an opportunity to scrutinize publicly funded prosecutors or police,⁷⁹ they sometimes afford an opportunity to observe the performance of publicly funded attorneys. When government is the defendant, civil proceedings allow public scrutiny of challenged legislation and other government action. Even in trials wholly between private parties who employ their own counsel, the presence of interested spectators is likely to have a salutary effect upon both the private participants and the judiciary, so that justice will be better served.

Second, the tendency of open adjudications to discourage perjury

448 U.S. at 567-72 ("The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.' . . . To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' . . . and the appearance of justice can best be provided by allowing people to observe it." (quoting 1677 Concessions and Agreements of West New Jersey, reprinted in *SOURCES OF OUR LIBERTIES* 188 (R. Perry ed. 1959)); *Gannett*, 443 U.S. at 428 (Blackmun, J., concurring and dissenting).

77. The term "defendants," as used here, includes all parties who are sued in civil courts: defendants, counter-defendants, cross-defendants, third-party defendants, and others.

78. The only exception is for contempt of court.

79. In some civil actions, such as those involving civil rights violations, the conduct of police and other government actors is under scrutiny.

and otherwise improve the quality of testimony, to induce witnesses to come forward, and to cause all trial participants to perform their duties more conscientiously, applies equally to civil litigation. As Justice Brennan noted in his *Richmond Newspapers* concurrence:

Of course, proper factfinding is to the benefit of criminal defendants and of the parties in civil proceedings. . . . [M]istakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial factfinding process, therefore, is of concern to the public as well as to the parties. Publicizing trial proceedings aids accurate factfinding.⁸⁰

The third factor supporting open proceedings also has its civil analogue. The ability of the courts to administer civil laws depends, in part, on public confidence, just as in criminal law administration. If parties are to obey court orders, and if defendants are to recognize court authority to impose and enforce money judgements, there must be public respect for and acquaintance with civil court processes. Allowing the public and press to observe court operations will enhance their understanding of, and hopefully their respect for, the civil judicial process.⁸¹

Finally, open civil proceedings also have some therapeutic value for the community. For instance, torts that result in serious bodily injury or harm to reputation may evoke outrage, hostility, and an urge to retaliate. Even contract breaches may evoke considerable community desire for redress.⁸² The public has a great interest in righting constitutional and statutory violations, ranging from antitrust or securities law violations to civil rights violations.⁸³ As in the criminal area, public awareness that the civil court system is functioning affords an outlet to these reactions. The concerns of victims and of the community are vindicated as they could not be if proceedings were closed.

80. *Richmond Newspapers*, 448 U.S. at 596 (Brennan, J., concurring) (footnotes omitted).

81. See *In re The Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1352 (D.C. Cir. 1985) (Wright, J., concurring and dissenting) (Civil adjudication, no less than criminal trials, must maintain its public legitimacy.).

82. The impetus to afford a remedy is arguably strongest when the breach has resulted not only in a loss to the promisee but also in an unjust gain to the breaching promisor. See Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 56 (1936). The nature and extent of the promisee's injuries and the moral quality of the breach are also among the factors influencing the conviction with which society feels that a judicial remedy should be afforded. See generally E. FARNSWORTH, CONTRACTS §§ 1.6, 12.1-3 (1982); J. MURRAY JR., MURRAY ON CONTRACTS §§ 172, 219-23 (1974).

83. On public law litigation, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Civil suits frequently involve "issues crucial to the public," *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983), cert. denied, 104 S. Ct. 1595 (1984), including school desegregation, race and gender discrimination, electoral politics, environmental control, freedom of speech, and the constitutionality of tax legislation.

Thus, as with the history of public trials, the policy grounds favoring open criminal trials also strongly favor open civil trials.⁸⁴

The Tension Between Pseudonymous Litigation and Public Access

As demonstrated above, the Supreme Court's first amendment analysis in the context of public access to criminal trials is equally applicable in the civil area. This section now addresses how pseudonymous litigation conflicts with the public trial concept.

One could dispute the tension between pseudonymous litigation and the concept of public trials on the ground that, typically, the public and press are as free to attend, observe, and report the courtroom proceedings in pseudonymous litigation as they are in any other litigation. Yet the public and press cannot learn pseudonymous litigants' true identities by attending court proceedings.

This is without precedent in English or early American common law, when the pseudonym "John Doe" was used only to designate a defendant in the pleadings until his real name could be ascertained or to designate the fictitious plaintiff in the action of ejectment.⁸⁵ Today such pseudonyms are used to avoid identification. In addition to being inconsistent with the long tradition of identified parties, pseudonymous litigation to some extent undermines the values served by open civil proceedings.⁸⁶ While the presence of spectators should continue to help

84. See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1595 (1984):

The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, and bankruptcy.

The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.

Finally, the fact-finding considerations relied upon by Justice Brennan obviously apply to civil cases. Openness in the courtroom discourages perjury and may result in witnesses coming forward with new information regardless of the type of the proceeding.

85. See 1 BOUVIER'S LAW DICTIONARY 912, 1696 (F. Rawle 8th ed. 1914); Note, *supra* note 2, at 775; Annot., 8 A.L.R. FED. 675 (1971); 27B C.J.S. *Doe, John* 972 (1959). As an example of a plaintiff's action in ejectment, see *Doe v. Braden*, 57 U.S. (16 How.) 635 (1853).

86. See *supra* text accompanying notes 77-84; see also *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981).

assure fair and accurate findings of fact and governing law, that effect is attenuated when the spectators do not know the identity of all parties. For example, when a litigant is a public figure, the public and press may be particularly inclined to scrutinize the participants' conduct, with a salutary effect upon their performances. That extra measure of community scrutiny will be absent so long as the identity and notoriety of the litigant are shielded by a pseudonym.⁸⁷

Similarly, the likelihood that the presence of spectators will discourage corruption, bias, or partiality on the part of the court is reduced when the litigants' identities are unknown to the public but known to the court. Ignorance of one or more of the parties' identities will impede the efforts of the public or press to investigate whether there are relationships or activities that might create bias, partiality, or corruption. Certainly the notion that open adjudications induce unknown witnesses to come forward with relevant testimony often loses its validity when litigation is pseudonymous.⁸⁸ Without a means of knowing who is suing whom, a potential witness would be unlikely to recognize that he had relevant testimony.

Moreover, use of pseudonyms may tend to undermine the confidence of the public in the administration of the law. Intuitively, one feels less able to judge the fairness of judicial proceedings pursued by unknown parties. Even if the record reveals enough about the plaintiff or defendant to allow an apparently adequate appraisal of the proceedings, the record may not quell all suspicions that the secret identity of a party or parties influenced the decision. The appearance of fairness is thus lost.

It seems likely that the therapeutic value promoted by open civil proceedings also will diminish when the litigants bear fictitious names, and that the catharsis involved will lessen when participants have been depersonalized.⁸⁹

Finally, secrecy hampers the structural function of the first amendment. Thus, the guaranteed rights to speak and to publish information about a trial lose some meaning when access to the parties' names is

87. Of course, once a public figure appears in person in connection with a judicial proceeding, any pseudonym would lose its efficacy.

88. In these days of wide ranging discovery, when litigants are entitled to demand of each other the identity and location of all persons having knowledge of any matter relevant to the subject of the pending action, FED. R. CIV. P. 26(b)(1), it is rather unlikely that there will be unknown witnesses whom open judicial proceedings will induce to come forward. The historical view to the contrary consequently has lost much of its validity, even when names are not hidden.

89. *Cf. Bridges v. California*, 314 U.S. 252, 268 (1941) ("[P]ublic interest is much more likely to be kindled by a controversial event of the day than by a generalization.").

foreclosed. The role of the first amendment in fostering self-government is, to a degree, frustrated because the discussion of governmental affairs is less informal when parties' true identities are masked.⁹⁰ It is therefore not surprising that several courts have found first amendment guarantees to be implicated by a pseudonymity request.⁹¹

It is noteworthy, in this connection, that the vast majority of cases in which pseudonymity has been sought either have challenged governmental activity or otherwise have involved the government as a party. This fact may make it particularly important that the judicial proceedings be open for observation in order to ensure against favoritism toward a coordinate branch, to encourage public scrutiny of government action, and to foster informed public debate on societal issues.

Thus, pseudonymous litigation is in tension with the rights of public access to judicial proceedings. At the same time, these concerns do not completely conflict. As the Fifth Circuit has noted:

The equation linking the public's right to attend trials and the public's right to know the identity of the parties is not perfectly symmetrical. The public right to scrutinize governmental functioning . . . is not so completely impaired by a grant of anonymity to a party as it is by closure of the trial itself. Party anonymity does not obstruct the public's view of the issues joined These crucial interests served by open trials . . . are not inevitably compromised by allowing a party to proceed anonymously.⁹²

This too must be reflected in the standards that determine whether pseudonymity will be permitted.⁹³

Tension Between Pseudonymous Litigation and Public Access to Judicial Records

A litigant's request for pseudonymity similarly may conflict with the

90. See, e.g., *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) (As against a plaintiff's asserted need to proceed anonymously, there remains a clear and strong first amendment interest in insuring that what transpires in the courtroom is public property.); *Doe v. Rostker*, 89 F.R.D. 158, 160-61 (N.D. Cal. 1981) (public has legitimate interest in knowing all the facts and events surrounding court proceedings).

91. See *supra* cases cited note 90; see also *Free Mkt. Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311, 312-13 (S.D.N.Y. 1983); *Doe v. Bodwin*, 119 Mich. App. 264, 326 N.W.2d 473 (1982).

92. *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981). The *Stegall* court also said that party anonymity does not obstruct the public's view of the court's performance, and that "[t]he assurance of fairness preserved by public presence at a trial is not lost when one party's cause is pursued under a fictitious name." *Id.* For the reasons stated throughout the text, the author believes that, in those propositions, the court understated the relevance of party identification.

93. See *infra* text accompanying notes 160-61.

public's right of access to judicial records.⁹⁴ Although legal writers often speak of judicial records and proceedings in a single breath, there is a separate right of access to judicial records that is distinguishable from the right of access to proceedings.⁹⁵

94. The names of litigants normally first appear in pleadings and then in motions filed with the court. Party names often appear later in discovery requests, responses, and memoranda.

95. The public's right of access to at least some judicial records, however, is not as great as its right of access to judicial proceedings:

[P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law . . . and, in general, they are conducted in private as a matter of modern practice [R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

. . . .

. . . [T]o the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.

Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2207-08 & n.19 (1984). Even in the context of writings that are introduced into evidence, when the "record" and the proceeding tend to merge, courts have drawn distinctions between the two for access purposes. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), a case that grew out of the Watergate investigation, broadcasters petitioned for access to tape recordings that were played to the jury and public in the courtroom and were admitted into evidence. Transcripts of the tapes were furnished to the jurors, reporters, and members of the public present at the trial. The Supreme Court observed that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. *Id.* at 597. While the contours of the common-law right are unclear, *id.* at 597-99, the Court unequivocally found that a qualified right to judicial records and documents exists. *Id.* at 598. The Court cited a citizen's desire to scrutinize governmental agencies and a newspaper publisher's intent to publish information concerning the operation of government as interests sufficient to compel access. *Id.* at 597-98. These same interests were cited by the Court in its subsequent decision, *Richmond Newspapers*, 448 U.S. at 584, 592-93, in which the Court held that the public's access to criminal trials is guaranteed by the first amendment. The Court stated that the decision lies in the sound and informed discretion of the trial court. *Nixon*, 435 U.S. at 599, 602-03. The trial court, in exercising its discretion, should balance the interests at stake and consider alternative avenues of public access. *Id.* at 603-08. The Court concluded, however, that the common-law right of access to judicial records did not authorize the tapes' release because Congress had prescribed an administrative procedure for processing and releasing to the public all of the ex-President's historical materials, including the recorded conversations at issue in *Nixon*. *Id.* at 608.

The Court's response to the contention that the first amendment required release of the tapes was less than satisfactory. The Court pointed out that the press had not been precluded from publishing the testimony and exhibits filed in evidence. *Id.* at 609. But it failed to explain how, if at all, the tapes in controversy differed in a legally significant way from other exhibits filed in evidence. For purposes of the common law, the Court regarded the right of access as applying to both the tapes and the documentary exhibits. *Id.* at 599 & nn.10-11; *accord* *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981); *United States v. Myers*, 635 F.2d 945, 950 (2d Cir. 1980). In concluding that "[t]here simply were no restrictions upon press access to, or publication of, any information in the public domain," *Nixon*, 435 U.S. at 609, the Court

The Supreme Court recognizes at least a common-law right of access to judicial records and documents that is closely tied to the public interest in overseeing governmental agencies.⁹⁶ Although some appellate courts have held that the right of access to judicial records and documents is not of constitutional stature,⁹⁷ several courts have recognized that the common law access right "supports and furthers many of the same interests which underlie those freedoms protected by the Constitution."⁹⁸ The law regarding public access to judicial records, therefore, is less clear than that regarding access to proceedings. Nevertheless, it does

begged the question of whether the tapes were not also in the public domain. Although it is true, as the Court observed, that the public had never had *physical* access to the tapes, *id.*, the relevance of that fact is unclear. Thus, having concluded that the public had no right to the tapes themselves, the Court relied on the principle that the first amendment grants the press no greater right to information about a trial than that enjoyed by the public. *Id.* at 609. The Court also rejected the argument that release of the tapes was required by the sixth amendment's public trial guarantee. *Id.* at 610. The Court held that that guarantee is satisfied by affording the public and the press the opportunity to attend trial and report what they have observed, and that the sixth amendment does not require any part of a trial to be publicly broadcast. *Id.* at 610; *cf. National Broadcasting Co.*, 653 F.2d at 614 (D.C. Circuit followed the *Myers* ruling.); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981) ("[P]ublic forum values . . . can be fully vindicated only if the opportunity for personal observation [of audio and video tapes] is extended to persons other than those few who can manage to attend the trial in person."); *Myers*, 635 F.2d at 952 ("[T]here remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence that records the activities of a Member of Congress and local elected officials, as well as agents of the Federal Bureau of Investigation.").

96. See *supra* notes 50-65 & accompanying text.

97. See *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426-29 (5th Cir. 1981) ("[N]either the public nor the press enjoys any constitutional right of physical access to exhibits introduced in evidence at a criminal trial."). But see *United States v. Criden*, 648 F.2d 814, 820 (3d Cir. 1981) (expressly not reaching the question whether the first amendment affords a qualified right of access to judicial records); *United States v. Mitchell*, 551 F.2d 1252, 1259 (D.C. Cir. 1976) (not reaching the question whether the first amendment affords a qualified right of access to judicial records), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). See generally Note, *Access to Taped Evidence: Bringing the Picture Into Focus*, 71 GEO. L.J. 193 (1982).

98. *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) ("We recognize . . . that the right here in question is of non-constitutional origin and that in a given case 'a number of factors may militate against public access.' " (quoting *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 434 (5th Cir. 1981)); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981), ("The right to inspect and copy . . . has been justified on the ground of the public's right to know, which encompasses public documents generally, and the public's right to open courts, which has particular applicability to judicial records."); *id.* at 820 ("[S]ome of the same policy considerations identified as supporting open trials may be considered when the issue involves the common law right of access to trial materials."); *id.* at 821 n.6 ("Arguably, the *Richmond Newspapers* case could be viewed as supporting a right of the public to access to the tapes through the medium of the broadcasters." (emphasis in original)); *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (Common-law right to inspect public and judicial

justify the conclusion that pseudonymity is in tension with public access rights to judicial records containing identifying information.⁹⁹

The Related Problem of Sealed and Pseudonymous Filings

Although the foregoing discussion of access to judicial records assumes that identifying information is contained in at least some papers filed with the court¹⁰⁰ and in its "public" record, that assumption some-

records is "fundamental to a democratic state."); see *United States v. Myers*, 635 F.2d 945, 949 (2d Cir. 1980) (characterizing the common-law right as "beyond dispute").

In *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984), the Seventh Circuit had the opportunity to decide whether a trial court had abused its discretion in granting public access to a "confidential" document admitted into evidence. The document in question was a report compiled by a special litigation committee formed by a corporate board of directors, the committee's legal counsel, and accounting consultants. The committee was formed to evaluate derivative claims, see FED. R. CIV. P. 23.1, which corporate shareholders sought to assert or to force the corporation to assert. The report reported and defended the committee's conclusions. *Continental*, 732 F.2d at 1304-05. The court affirmed the disclosure order, reasoning that the presumption in favor of public access to judicial records is both fundamental to a democratic state, *id.* at 1308 (quoting *Mitchell*, 551 F.2d at 1258), and is of constitutional magnitude. *Continental*, 732 F.2d at 1308. The court felt that the policy reasons for granting public access to criminal proceedings apply to civil cases as well. *Id.* As a consequence, the court balanced the public interests underlying access against appellant's confidentiality interest, and ruled that the document in question had to be made available because no "exceptional circumstances" required confidentiality. *Id.* at 1313-14.

99. For thoughtful treatment of the reasons for including pretrial documents within the right of access, see Note, *supra* note 14, at 1821-28. The recent decision of the Court of Appeals for the District of Columbia in *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985), also dealt with this tension. The court considered a question of timing; whether there is, prior to judgment, a *first amendment* right of public access to court records pertaining to private civil actions. *Id.* at 1326. The court concluded that there is no such right, and consequently that reporters had no first amendment entitlement to a document by document determination of the need for confidentiality prior to the dates that final judgments were entered in the case. *Id.* at 1339. If the court is correct, then the tension between a litigant's request for, and a court's grant of, pseudonymity and the public's qualified first amendment right of access to judicial records need not be resolved until final judgment, at least in civil suits wholly between private parties. Some federal courts, however, have extended a conditional *common-law* right of access to various records prior to judgment. *E.g.*, *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-80 (6th Cir. 1983), *cert denied*, 104 S. Ct. 1595 (1984); *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 101 F.R.D. 34, 43 (C.D. Cal. 1984) (right of access attaches when documents are submitted to a court in connection with a motion). The courts could be called upon during the pendency of the case to resolve the tension between pseudonymity and any such *common-law* right of access. Moreover, many of the cases in which litigants seek pseudonymity include governmental parties, and the *Reporters Committee* court made clear that civil cases in which a government agency is a party appear always to have been outside what it calls the "prejudgment nonaccess rule." *Reporters Comm.*, 773 F.2d at 1336 n.8.

100. That is often, but not always, true. See, e.g., *Roe v. Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973) (court satisfied with plaintiffs' attorneys' representations to the court that the fictitiously named plaintiffs were real and specific aggrieved individuals).

times may be false.¹⁰¹ In order to preserve anonymity, a litigant may file the first pleading or motion pseudonymously, while requesting leave to so proceed in papers filed under seal, if they reveal the party's true identity.¹⁰² Thus, two inextricably related facets of pseudonymous litigation are pseudonymous filings and sealed filings containing the party's identity. Consequently, in determining the appropriate barriers to litigant anonymity, courts also should look to the common-law standards for issuing similar protective orders.

When deciding whether to allow materials to be filed under seal, the courts are guided by the basic principles that "every court has supervisory power over its own records and files," and that "the decision as to access is one best left to the sound discretion of the trial court."¹⁰³ The district court's discretion is circumscribed, however, by the public's presumptive right to inspect and copy judicial records. Recognizing the common heritage of the right of access to judicial proceedings and to court records, the values these rights commonly serve and their comple-

101. There is a growing body of law concerning which papers filed with the court are in its public record and which are not. *See, e.g.*, *United States v. Myers*, 653 F.2d 945, 952 (2d Cir. 1980) (videotapes admitted into evidence at a public trial open to public inspection even though their admissibility subject to constitutional challenge); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980) (For access purposes, papers produced through discovery are not in the court's "possession" prior to their admission into evidence.); *United States v. Gurney*, 558 F.2d 1202, 1210-11 (5th Cir. 1977) (Courts may refuse to publicize names and addresses of jurors; the press has no right of access to exhibits produced under subpoena and not yet admitted into evidence; and the press has no constitutional right of access to written communications between the judge and the jury.), *cert. denied*, 435 U.S. 968 (1978); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539, 543-45 (E.D.N.Y. 1983) (documents attached to and referred to in the parties' summary judgment papers publicly accessible despite their submission under seal, pursuant to a protective order); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 897-901 (E.D. Pa. 1981) (Materials not within the court's possession are not publicly accessible. It is unclear whether materials in the court's temporary possession for purposes of evidentiary rulings must be made publicly available. The right to inspect judicial records attaches to all materials filed with the court's clerk, unless filed under seal pursuant to court order. That right also includes nonfiled materials that have been relied upon by the court in a ruling or discussed in a published opinion.); *Cianci v. New Times Publishing Co.*, 88 F.R.D. 562, 564-65 (S.D.N.Y. 1980) (Deposition transcript and answers to requests to admit became part of the public record when used by the parties in their arguments or when considered by the court in deciding a motion.).

A complaint and a defendant's answer or motion in response to the complaint are normally part of a court's public record. *In re Halkin*, 598 F.2d 176, 191 n.29 (D.C. Cir. 1979) (Responses to document requests become part of the public record if a party relies on them in a pleading.); *Zenith*, 529 F. Supp. at 897-98.

102. A named defendant who wished to remain anonymous would have to move that the complaint be sealed, and perhaps, that an amended complaint be filed which would refer to the defendant by a pseudonym. Of course, plaintiffs could undermine defendants' efforts to hide their identity by publicizing the lawsuit prior to defendants' receipt of any other notice of the litigation.

103. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978).

mentary support of the first amendment,¹⁰⁴ some courts, when asked to “close” judicial records, purport to apply standards similar to those enunciated in *Press-Enterprise* and adumbrated in earlier Supreme Court cases.

For example, in *In re Knoxville News-Sentinel Co.*,¹⁰⁵ a plaintiff bank was permitted to remove from the court’s record two exhibits that the bank had filed with its complaint. The Sixth Circuit held that only the most compelling reasons could justify that removal.¹⁰⁶ The “presumptively paramount” public access right had to be weighed against the competing privacy rights of bank customers whose names, along with financial information, were included in the two removed exhibits.¹⁰⁷ The court nonetheless found that the customers’ privacy interests, as recognized and supported by congressional statutes and regulatory rules, constituted a compelling interest that outweighed the public’s interest in the litigation.¹⁰⁸ The court ruled that the district court’s order was tailored narrowly to serve that interest.¹⁰⁹

Earlier cases recognized a presumptively paramount public interest,¹¹⁰ but they also reflected some categorical notions of interests that may override the public’s access rights.¹¹¹ For example, when disclosure would reveal trade secrets or matters of national security, courts often withhold judicial records.¹¹² Thus, the overriding interest can be a func-

104. See, e.g., *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-71, 1073 (3d Cir. 1984); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308-10 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983); *In re “Agent Orange” Prod. Liab. Litig.*, 98 F.R.D. 539, 543 (E.D.N.Y. 1983); see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 901-03, 913-16 (E.D. Pa. 1981).

105. 723 F.2d 470 (6th Cir. 1983).

106. *Id.* at 476.

107. *Id.* at 476-78.

108. The court so held even though the public had a special interest: the litigation had been triggered by a governmental order to the bank to correct public statements and to file amended reports of condition and income. The bank’s reliance upon a protective order in filing its exhibits was a factor. *Id.* at 478. The court stressed the need for the public and press to be heard on the question of their exclusion, and outlined a procedure to be followed when litigants seek to have documents sealed. *Id.* at 475-76.

109. *Id.* at 476-77.

110. See, e.g., *Crystal Grower’s Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980) (Although public interest is presumptively paramount, that interest would not be impaired by retaining appellate documents under seal for a limited time.).

111. In *Knoxville*, for example, the court commented that “trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public’s right to know.” 723 F.2d at 474.

112. Note, *Trial Secrecy*, *supra* note 49, at 1919-21; Note, *First Amendment Interests in Trade Secrets, Private Materials, and Confidential Information: The Use of Protective Orders in Defamation Litigation*, 69 IOWA L. REV. 1011, 1028-30 (1984); see also *Nixon v. Warner*

tion of the content of the information at issue.¹¹³ The Supreme Court has indicated that access also may be denied when there is reason to believe that the court files would become "a vehicle for improper purposes," such as gratifying private spite, promoting public scandal, or publishing libel.¹¹⁴ Conversely, an especially strong public interest in a document's release, beyond the universally applicable interests,¹¹⁵ can be determinative.¹¹⁶

Case law regarding protective orders sealing information obtained through discovery¹¹⁷ is also useful by analogy. The question of pseudonymity for litigants ordinarily does not arise during the discovery process because litigants' names typically are known from the initial complaint and summons.¹¹⁸ Protective orders may, however, implicate protected

Communications, Inc., 435 U.S. 589 (1978) (trade secrets); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889-900 & n.42 (E.D. Pa. 1981) (trade secrets).

113. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984). The court also opined that the overriding interest can involve the relationship of the parties or the nature of the controversy.

114. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) (citing *In re Caswell*, 18 R.I. 835, 836, 29 A. 259, 259 (1893)); see *Cianci v. New York Times Publishing Co.*, 88 F.R.D. 562 (S.D.N.Y. 1980) (The court sealed all depositions in a libel action in which the plaintiff argued that sealing was necessary to protect against further libel and misuse of the depositions. The court unsealed the documents after they became part of the public record.).

115. See *supra* text accompanying notes 66-76.

116. See, e.g., *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180-81 (6th Cir. 1983) (The public had a strong interest in obtaining court record that showed "tar" and nicotine contents of various cigarettes brands, reflected the government's response to allegations of testing error, and showed the basis of the trial and appellate court decisions.); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (ordering unsealing of a special litigation committee report in a shareholders' derivative suit partly because the corporation was publicly owned and the litigation directly concerned management's obligations to shareholders), *cert. denied*, 460 U.S. 1051 (1983); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539, 547 (E.D.N.Y. 1983) (public interest in release of documents submitted on summary judgment motion particularly strong because of public interest in the chemical dioxin, which allegedly injured thousands of veterans and their families).

117. Discovery is governed by the Federal Rules of Civil Procedure. FED. R. CIV. P. 26-37.

118. Rule 10(a) of the Federal Rules of Civil Procedure provides in pertinent part: "In the complaint the title of the action shall include the names of all the parties . . ." *Id.* Rule 10(a). Rule 4(b) provides in pertinent part: "The summons shall . . . contain . . . the names of the parties, [and] be directed to the defendant . . ." *Id.* Rule 4(b). Under Rule 4(d), "[t]he summons and complaint shall be served together." *Id.* Rule 4(d). Absent class members in class actions brought pursuant to Rule 23 are an arguable exception to the general rule that the parties' names appear in the complaint. *Id.* Rule 3. However, such absent class members may or may not be regarded as "parties," depending upon the context in which that question arises. See generally Steinman, *The Party Status of Absent Plaintiff Class Members: Vulnerability to Counterclaims*, 69 GEO. L.J. 1171 (1981). Moreover, when such absentees' names are sought, that may or may not be "discovery," depending upon the purposes for

first amendment rights. In *In re Halkin*,¹¹⁹ for example, the United States Court of Appeals for the District of Columbia held that an order restraining the parties and their counsel from publicly disclosing documents and information obtained through discovery constituted government action limiting speech that must be scrutinized carefully under the first amendment.¹²⁰

The Supreme Court unanimously disapproved *Halkin* in *Seattle Times Co. v. Rhinehart*.¹²¹ The Court addressed the question of whether parties to civil litigation have a first amendment right to disseminate, before trial, information gained through formal pretrial discovery.¹²² The Court in *Rhinehart* recognized that orders prohibiting the dissemination of information and materials gained during discovery implicate the restricted party's first amendment rights.¹²³ The Court emphasized, however, that "[a] litigant has no First Amendment right of access to

which the names are sought. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350-55 (1978).

Under Rule 26(c), upon motion by a party or person from whom discovery is sought, and for good cause shown, a court "may make any order which justice requires to protect a party or person from annoyance, oppression, undue burden or expense." FED. R. CIV. P. 26(c). Under this provision, courts do seal documents generated or produced in the discovery process, and often concomitantly order the recipients not to utilize the information for any purpose other than the litigation and not to disseminate the information except to specified categories of persons. *See, e.g., Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866 (E.D. Pa. 1981).

119. 598 F.2d 176 (D.C. Cir. 1979).

120. *Id.* at 182-83. Plaintiffs' suit charged that federal agencies had conducted unlawful surveillance of political activists who opposed the war in Vietnam. Plaintiffs' counsels' proposal to release some documents produced in discovery by the Central Intelligence Agency had led to the order challenged on appeal. *Id.* at 179-82.

The court concluded that, to withstand such scrutiny, "the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." *Id.* at 191 (footnotes omitted). The court elaborated: "the trial court must . . . require a specific showing that dissemination of the discovery materials would pose a concrete threat to an important countervailing interest," *id.* at 193, and must make adequate findings in support of its conclusions. *Id.* at 194 n.42, 196-97. For a criticism of the *Halkin* test, see Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 25 (1983).

121. 104 S. Ct. 2199 (1984).

122. *Id.* at 2206. The Court stated that it had granted certiorari to resolve the conflict between the approaches taken by the Supreme Court of Washington in *Rhinehart*, the District of Columbia Circuit in *In re Halkin*, and the Court of Appeals for the First Circuit in *In re San Juan Star Co.*, 662 F.2d 108 (1981). In *San Juan Star*, the court found "the appropriate measure of such limitations [on dissemination] in a standard of 'good cause' that incorporates a 'heightened sensitivity' to the First Amendment concerns at stake." *Id.* at 116 (citations omitted).

123. *Rhinehart*, 104 S. Ct. at 2207-08; *see id.* at 2210 (Brennan, J., concurring).

information made available only for the purposes of trying his suit,"¹²⁴ and that liberal discovery is "a matter of legislative grace," which is "provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."¹²⁵ Thus, "continued court control over the discovered information does not raise the same spectre of government censorship that such control might suggest in other situations."¹²⁶

The Court in *Rhinehart* rejected the heightened first amendment scrutiny mandated in *Halkin*, and instructed courts to focus simply on whether the "good cause" requirement of Federal Rule of Civil Procedure 26(c) has been met.¹²⁷ In addition, the Court dispensed with the

124. *Id.* at 2207 (citations omitted).

125. *Id.* at 2207-08.

126. *Id.* at 2207 (citations omitted). Looking to common law and contemporary practice, the Court further reasoned that "pretrial depositions and interrogatories are not public components of a civil trial." *Id.* at 2207. Consequently, restraints on the dissemination of such materials do not restrict a traditionally public source of information. *Id.* at 2208. Nor is an order limiting such circulation a classic prior restraint, which requires exacting first amendment scrutiny, because the restricted party is free to disseminate the identical information if it is gained independently of the court's processes. *Id.*

The Court concluded that the propriety of the limitation of first amendment rights should turn on whether it furthers an important or substantial governmental interest unrelated to the suppression of expression and on whether it is no greater than necessary to protect that governmental interest. *Id.* at 2207 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)). The Court then found that Federal Rule of Civil Procedure 26(c), authorizing protective orders generally, furthers a substantial government interest unrelated to the suppression of expression: the interest in preventing abuse of the discovery process through release of discovered information that could be damaging to reputation and privacy. *Rhinehart*, 104 S. Ct. at 2208-09. Thus, having found that Rule 26(c) passed constitutional muster, the Court concluded that any protective order that conforms to the requirements of Rule 26(c) is proper. In particular, when "a protective order is entered on a showing of good cause . . . , is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id.* at 2209-10 (footnote omitted). The Court added that "heightened First Amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals." *Id.* at 2209 n.3 (citation omitted).

Justice Brennan concurred on the ground that a substantial government interest supported the particular protective order at issue. *Id.* at 2210 (Brennan, J., concurring). In seeking the protective order, plaintiffs had relied upon the rights of privacy and of religious association, *id.* at 2203-04, and the trial court was correct to be concerned that a refusal to enter the protective order would have "chilled" the right of persons to resort to the courts for redress of grievances. *Id.* at 2210 n.24. The majority opinion also noted that the Washington Supreme Court "properly emphasized the importance of ensuring that potential litigants have unimpeded access to the courts." *Id.* at 2209 n.22.

127. *Rhinehart* suggests that the Court is in substantial agreement with parts of Judge Wilkey's dissent in *Halkin*:

[T]he "good cause shown" standard in Rule 26(c) is less stringent than the standard set forth in *Nebraska Press Ass'n* [I]n order to obtain a protective order under Rule 26(c), it is not necessary to demonstrate the same *exceedingly high* probability

need for "burdensome" evidentiary findings. While the Court noted that the restriction on speech should be no greater than necessary, it did not test the protective order challenged in *Rhinehart* against that standard. The Court rejected the tripartite requirements of *Halkin*¹²⁸ because they "would impose an unwarranted restriction on the duty and discretion of the trial court to oversee the discovery process."¹²⁹

The implications of *Rhinehart* for pseudonymous litigation are relevant here. Such litigation will involve some combination of pseudonymous filings, sealed filings, and protective orders prohibiting the parties and their counsel from disclosing the identities of the pseudonymous litigants. Should a showing sufficient to justify the sealing of records identi-

of harm that may be needed to justify broader restraining orders. It may be enough to show that the predicted harm is reasonably likely to occur unless a protective order is issued. Second, it is not necessary . . . to show the same degree of serious and irreparable harm called for under the *Nebraska Press Ass'n* standard. Less crippling harm may do. Nor is it necessary under Rule 26(c) to invoke the same quality of competing interest demanded by the *Nebraska Press Ass'n* standard. Somewhat more mundane interests are cognizable; for example, an order may issue to protect business information or even to protect against personal embarrassment. Third, it is not necessary for district courts to make the same kind of formal and specific factual findings or to articulate these findings as elaborately as has been required under the *Nebraska Press Ass'n* line of cases. The district court's decision under Rule 26(c) is discretionary and involves the balancing of various competing interests; it is enough that the district court provide a record sufficient for meaningful review.

Halkin, 598 F.2d at 206 (Wilkey, J., dissenting) (emphasis in original). The injury that will result from disclosure must be shown with specificity; conclusory statements are insufficient. See, e.g., *Zenith Radio Corp. v. Matsusita Elec. Indus. Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981) (citing *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981); *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (S.D.N.Y. 1971); *Hunter v. International Sys. & Controls Corp.*, 51 F.R.D. 251, 255 (W.D. Mo. 1970)). See generally 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2035, at 264-65 (1970). But as Judge Wilkey observed, all that is actually required is "that the moving party provide the court with information sufficient to enable it meaningfully to balance the moving party's interests against the opposing party's interests." *Halkin*, 598 F.2d at 210 (Wilkey, J., dissenting). The degree of specificity courts demand of the moving party probably will increase with the restrictiveness of the requested protective order. *Id.* at 210-11.

The movant usually must show that disclosure will work a clearly defined and serious injury. *Zenith*, 529 F. Supp. at 891 (citing *Essex Wire Co. v. Eastern Elec. Sales*, 48 F.R.D. 308, 310 (E.D. Pa. 1969); *United States v. Lever Bros. Co.*, 193 F. Supp. 254, 257 (S.D.N.Y. 1961), *cert. denied*, 371 U.S. 932 (1962)). Some courts have required "very serious injury," see, e.g., *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979) (quoting *United States v. IBM*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)), but the kind of showing needed necessarily depends upon the type of harm threatened: "Some kinds of harm are capable of clear objective demonstration [O]ther kinds of harm are more subtle and less amenable to objective demonstration. Annoyance, embarrassment, and harassment . . . are relatively difficult to demonstrate with particularity." *Halkin*, 598 F.2d at 211 (Wilkey, J., dissenting).

128. See *supra* note 126.

129. *Rhinehart*, 104 S. Ct. at 2206. For one critique of *Rhinehart*, see Note, *supra* note 14, at 1839-44.

fying the litigants to the court and sufficient to justify a nondisclosure order early in the litigation also suffice to justify the use of pseudonyms throughout trial? If so, the more stringent tests for closure enunciated in *Press-Enterprise*¹³⁰ would be displaced in this context.

First, one must consider whether *Rhinehart* applies when the information sought to be protected ordinarily would be revealed in the pleadings rather than through discovery mechanisms. The Court's conclusions in *Rhinehart* were predicated in part on its finding that discovery proceedings are conducted in private as a matter of both common law and modern practice.¹³¹ As a matter of custom, access is subject to the trial court's control.¹³² Although pleadings are similarly drafted in private, they *must* be filed with the court and are ordinarily a public component of contemporary civil litigation, immediately part of the public record.¹³³ Pleadings have been sealed on occasion, so access

130. See *supra* notes 10-14 & accompanying text.

131. *Rhinehart*, 104 S. Ct. at 2207-08. One commentator has questioned the Court's conclusion by arguing that there traditionally has been some expectation of openness with respect to discovery materials and by asserting that "[t]he presumption of openness of records and documents was preserved as the Federal Rules of Civil Procedure were adopted and amended." Note, *supra* note 14, at 1826-27.

The *Rhinehart* Court further noted that, although the Federal Rules of Civil Procedure may require parties to file certain responses to discovery requests, such as interrogatory answers, responses to requests to admit, and deposition transcripts, the Rules need not so provide. *Rhinehart*, 104 S. Ct. at 2206.

132. *Rhinehart*, 104 S. Ct. at 2207 n.19. Under the Federal Rules of Civil Procedure, deposition transcripts always are supposed to be filed in securely sealed envelopes. FED. R. CIV. P. 30(f), 31(b). Under Rule 26(c)(8), for good cause shown, the court may order "that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court." *Id.* Rule 26(c)(8).

133. Under the Federal Rules of Civil Procedure, pleadings must be filed. FED. R. CIV. P. 3, 5(a), (d). Pleadings need not be admitted into evidence, argued by the parties, or relied upon in a judicial decision to become part of the public judicial record. See *supra* note 101. It is not clear how long a tradition this modern practice reflects. The District of Columbia Circuit Court of Appeals recently observed that it was "certainly unaware of any tradition of public access (pre- or post-judgment) to all documents consulted (or . . . consultable) by a court in ruling on pretrial motions. If such a tradition existed, public files would presumably be filled with complaints stricken as scurrilous . . ." *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1328 (D.C. Cir. 1985) (emphasis added). The court's presumption seems dubious; it cites no statistics reflecting large numbers of scurrilous complaints being filed, past or present, and its lack of awareness does not establish that pleadings traditionally have not been accessible to the public. Traditional practice is not easy to infer from the few reported cases. The case of *Schmedding v. May*, 85 Mich. 1, 48 N.W. 201 (1891), for example, indicates that it was customary for newspapers to gain access to civil court records, including pleadings, from the time they were filed. *Id.* at 1-5, 48 N.W. at 201-02. The court in that case refused to grant mandamus requiring the custodian of civil court records to make available to a newspaper reporter the notations concerning the filing of certain actions. Its reasoning, in part, was that litigants, *under the direction of the court*, lawfully could withhold the records in the case until they were made public by proceedings in open court or by consent of the parties. *Id.* at 7,

is, as a practical matter, subject to the trial court's control. Still, pleadings are generally part of the public judicial record. Moreover, the sealing of pleadings for the specific purpose of keeping party identities confidential is quite a recent phenomenon in the federal courts.¹³⁴ Hence, there is no pertinent long-term custom undercutting the tradition of public access to pleadings. Consequently, unlike restrictions on the dissemination of discovery, restrictions placed on access to pleadings do restrict a traditionally public source of information.

The *Rhinehart* Court also relied upon the proposition that litigants have no first amendment right of access to information made available through discovery because they gain such information "only by virtue of the court's discovery processes."¹³⁵ By contrast, plaintiffs learn defendants' names without the aid of court processes. Although defendants arguably learn the plaintiffs' identities because the Federal Rules of Civil Procedure require identification of the plaintiff in the complaint,¹³⁶ this requirement is mandated by a due process right to know the identity of their litigation adversaries.¹³⁷ Nevertheless, court control over the infor-

48 N.W. at 203. One could infer from this reasoning that there was an immediate, though qualified, right of public access to civil court filings, which could be cut off when a court found such action warranted under the circumstances.

Even the District of Columbia Circuit's conclusion was merely that it could not "discern an historic practice of such clarity, generality and duration as to justify the pronouncement of a constitutional rule preventing federal courts and the states from treating the records of private civil actions as private matters *until trial or judgment*." *Reporters Comm.*, 773 F.2d at 1336 (emphasis added). Even if the District of Columbia Circuit is correct on this point, the public right of access to pleadings traditionally could be exercised, but only after trial or judgment. Judge Wright, dissenting in part, was not persuaded that the historic common-law right of access was not implicated prejudgment. *Id.* at 1348 (Wright, J., concurring and dissenting). His analysis of the nineteenth-century cases was that they limited access to pretrial pleadings only before trial. *Id.* at 1348-51 & nn.17-18 (Wright, J., concurring and dissenting). Judge Wright concluded that a review of precedent to the present "suggests a presumptive right of contemporaneous access to the records of civil proceedings." *Id.* at 1351 (emphasis added) (Wright, J., concurring and dissenting). Cases that refused access to civil court filings prior to disclosure in open court also are distinguishable from most of the twentieth-century cases involving pseudonymity. The later cases frequently include the government as a litigant while the earlier cases emphasized that they were between private parties and that the public lacked a legitimate interest in knowing the nature of the disputes. When government is suing or being sued, there typically is a legitimate public interest, even in the allegations. The District of Columbia Circuit in *Reporters Committee* recognized that civil matters in which a government agency was a party appear always to have been outside what it called the pre-judgment nonaccess rule. *Id.* at 1336 n.8.

134. See *supra* text accompanying note 85.

135. *Rhinehart*, 104 S. Ct. at 2207.

136. See FED. R. CIV. P. 10 ("In the complaint the title of the action shall include the names of all the parties.").

137. E.g., *Kuhn v. Philadelphia Elec. Co.*, 85 F.R.D. 86, 88 (E.D. Pa. 1979) (Due process dictates that by "defendant be notified a reasonable amount of time before trial of the identity

mation arguably does not constitute impermissible censorship because litigant identity, like "discovered" material, is made available only for purposes of trying the lawsuit. As part of the pleadings, litigant identity helps to give notice of the claims and defenses to be adjudicated, to frame the issues, and to facilitate speedy resolution of insubstantial claims and defenses.¹³⁸

The *Rhinehart* Court bolstered its conclusion by stressing the limited nature of the restraint: a party is free to disseminate any information gained through means other than discovery. An equivalent limitation probably would hold true in pseudonymous litigation. The only sources for litigants' true identities *as litigants* are the court records and the litigants themselves. If the litigants publicized their involvement in a lawsuit, the court would have no reason to keep that information confidential.

Finally, the Court in *Rhinehart* implied that, just as litigants have no first amendment right of access to information made available by discovery, nonlitigants have no such first amendment right of access. It is not so clear that the public today has no first amendment right of access to litigants' names.¹³⁹ Moreover, *once the judiciary acts*, access promotes public scrutiny of the judicial process, enhances both confidence in the administration of the law and the therapeutic value of open proceedings, and serves the structural function of the first amendment by enabling informed discussion of judicial operations.¹⁴⁰ These rationales do not apply before the court has acted.¹⁴¹

In sum, in view of the differences between pleadings and discovery,

of persons whose claims it must be prepared to defend against."); *see also* Brouillette v. Board of Directors, 519 F.2d 126, 128 (8th Cir. 1975) (Due process required notice of the names of those who had made allegations against a teacher.); *Miller v. Dean*, 430 F. Supp. 26, 28 (D. Neb. 1976), *aff'd per curiam*, 552 F.2d 266 (8th Cir. 1977).

138. The parties' names, as part of the pleadings, may also help to decide questions of res judicata and collateral estoppel. *See* C. WRIGHT, *THE LAW OF FEDERAL COURTS*, § 68 (4th ed. 1983).

139. *See supra* note 133 & accompanying text.

140. *See supra* text accompanying notes 85-91.

141. *See* Marcus, *supra* note 120, at 11-15, 37-40. In discussing the pretrial discovery context, Professor Richard Marcus has written that the goals of

heightening public respect for the judicial process and permitting public scrutiny of judicial performance . . . ha[ve] little application Indeed, one objection to allowing public access . . . is that in most cases no judge is present to rule on the propriety of the inquiry being pursued A person observing a deposition would garner only minimal insight into judicial decision-making.

Id. at 40. By analogy, pleadings and motions provide little insight into judicial decision making. Hence, there need not be a constitutional right of immediate public access to such party-generated papers. Moreover, the mere existence of a judicial decision allowing pseudonymous filing should not create a right of access to filings that reveal the litigant's identity. That would

it does not follow inevitably from *Rhinehart* that the unadorned good cause standard of Rule 26(c) should apply to pseudonymous filings. The differences between the two suggest that the higher standards of the Court's access cases still could apply to pseudonymous and sealed filings and to the related protective orders necessary to keep litigants' identities from the public.¹⁴²

The Waiver Justification for Public Access

Those who oppose pseudonymous litigation argue that a plaintiff, by initiating litigation, automatically waives any right to keep his identity confidential from the public, his adversary, or the court. As noted above, when a plaintiff brings suit and requests relief from the courts, he normally must identify himself to the court, the defendant, and the public at large. On occasion, judicial opinions suggest that this always should be so: when government is the defendant, "one who strikes the king should do so unmasked or not at all;"¹⁴³ when a private party is the defendant, basic fairness dictates that the defendant's accusers reveal their real names.¹⁴⁴

These blanket arguments against pseudonymity should be rejected, however, for they render too costly the exercise of the right to sue. Plaintiffs should not automatically be forced to choose between asserting their substantive rights in court and thereby forfeiting their privacy or security interests, and foregoing their substantive rights as the price of preserving their privacy or security. The "either-or" approach interferes with plaintiffs' constitutional right to have claims adjudicated by the court,¹⁴⁵ and

obviously be self-defeating. Judicial decisions in a case, however, do implicate the first amendment right of access.

142. See *supra* text accompanying notes 11-14, 30.

143. *Doe v. Stegall*, 653 F.2d 180, 189 (5th Cir. 1981) (Gee, J., dissenting).

144. *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979).

145. See *Doe v. Bodwin*, 119 Mich. App. 264, 266-70, 326 N.W.2d 473, 474-76 (1982) (rejecting trial court's conclusion that plaintiff waived anonymity by filing suit, holding that trial court had discretion to allow pseudonymous litigation, relying in part on plaintiff's constitutional rights to privacy and access to the courts). Individuals and groups have a constitutional right of access to the courts, which includes a constitutional right to be heard on the merits of their claims. The precise constitutional origins and scope of the right of access to the courts are not clear. It may spring from the due process clauses of the fifth and fourteenth amendments. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1970).

In several early cases, the Court held the right to sue to be among the "privileges and immunities" protected by article IV, section 2, paragraph 1, and by the fourteenth amendment to the Constitution. See, e.g., *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 148 (1907).

The right of access to the courts also may be grounded in the first amendment. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) ("Collective activity undertaken

minimizes the practical value of substantive rights accorded by legislatures and courts.¹⁴⁶

It is particularly unacceptable to condition exercise of the right of adjudication upon plaintiff's public disclosure of his identity when plaintiff sues to vindicate privacy rights. In such a situation, publicity would inflict the very injury the litigant seeks to avoid by resort to the courts. In some instances, this irony has not escaped the courts.¹⁴⁷ Moreover, insofar as the waiver argument automatically gives priority to the public's claim of entitlement to know plaintiff's identity over plaintiff's claim of entitlement to confidentiality, without examining the relative strengths and weakness of those claims, it is bound to produce unjust and undesirable results.¹⁴⁸

Accordingly, the waiver argument should be rejected. Requests for pseudonymity by plaintiffs or defendants should be treated equally. Both plaintiffs and defendants should be required to demonstrate that the need for confidentiality outweighs the public's interest in access to the litigant's name.¹⁴⁹

to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."); *see* *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972) (right of access to the courts one aspect of the right to petition).

Finally, in some cases, a right of access to the courts is maintained without identifying the specific constitutional source. *See, e.g.,* *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972) (Negligence by court clerk, which impeded filing of prisoner's petition for post-conviction relief, violated his "constitutionality based" right of access to the courts.); *see also* 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2018, at 145 (1970) (referring to "constitutional right to bring . . . an action").

146. When plaintiff sues to enforce a fundamental right, such as the constitutional right to privacy, one could argue further that the first amendment and the due process clauses of the fifth and fourteenth amendments forbid the courts from conditioning exercise of one fundamental right upon the waiver of another.

The first argument against waiver made in the text is weakest in cases in which plaintiffs need not have joined the lawsuit in order for their rights to be protected. *See, e.g.,* *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979); *infra* text accompanying notes 317-29.

147. *Roe v. Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973).

148. *See, e.g., Doe v. Bodwin*, 119 Mich. App. 264, 270, 326 N.W.2d 473, 476 (1982) (remanding for rehearing before a different judge because original trial judge had indicated that he would never permit anonymity, and a proper exercise of discretion could result in granting plaintiff's motion to proceed anonymously).

149. One might also suggest that pseudonymity sometimes, or even always, should be disallowed as a way of screening out frivolous claims, on the theory that a claim to which a plaintiff is unwilling to put his name is far more likely to be frivolous than is a claim that the plaintiff is willing to publicly assert. This suggestion should be rejected as well. As discussed below, there are many legitimate reasons for plaintiffs to seek pseudonymity, and there already exist far more precise tools for identifying and quickly eliminating frivolous claims. *See* FED. R. Civ. P. 12(b)(6), 56.

The Federal Rules' Lack of Guidance on Pseudonymity

Proponents of public access to all civil litigants' names also argue that the Federal Rules of Civil Procedure prohibit the use of pseudonyms by parties. The Federal Rules nowhere authorize pseudonymous litigation. To the contrary, Rule 10(a) provides that "[i]n the complaint the title of the action shall include the names of all the parties,"¹⁵⁰ while Rule 3 requires the complaint to be filed with the court in order to commence a civil action.¹⁵¹ Subsequent papers that are required to be served on a party must also be filed with the court unless the court orders otherwise, which it may do with certain discovery matters.¹⁵² On rare occasions, courts denying a request to allow a pseudonymous suit have purported to rely upon the Federal Rules' failure to authorize the practice.¹⁵³ Almost all courts that have considered this question, however, have held that the Rules' silence on this issue, or even their contrary implications, are not dispositive.¹⁵⁴ These rulings reflect the better view. Nothing in the Advisory Committee Notes to the Rules indicates that the drafters were purporting to lay down an absolute rule that neither a civil plaintiff nor a civil defendant ever could sue or be sued pseudonymously, regardless of the particular circumstances.¹⁵⁵

Balancing the Interests in Confidentiality and Disclosure: A Proposed Analysis

This Article has demonstrated the tension that exists between pseudonymous civil litigation and the first amendment rights of access to judicial proceedings, access to judicial records, and dissemination of matters learned in litigation. It has examined case law in these areas to ascertain the tests that courts should apply in determining whether, and for how long, to allow particular civil cases to be conducted pseudony-

150. *Id.* Rule 10(a).

151. Rule 3 provides, "[a] civil action is commenced by filing a complaint with the court." *Id.* Rule 3.

152. *Id.* Rule 5(d).

153. *E.g.*, *Roe v. New York*, 49 F.R.D. 279, 281 (S.D.N.Y. 1970).

154. *See, e.g.*, *Coe v. District Court*, 676 F.2d 411, 414 (10th Cir. 1982); *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981); *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979); *Free Mkt. Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311, 312-13 (S.D.N.Y. 1983); *Doe v. Rostker*, 89 F.R.D. 158, 160-61 (N.D. Cal. 1981) (Although the particular facts did not justify noncompliance with Rule 10(a), the court recognized valid reasons for permitting plaintiffs to proceed anonymously.); *Roe v. Borup*, 500 F. Supp. 127, 128-29 (E.D. Wis. 1980) (also rejecting the argument that the absence of true names on the summonses violated Rule 4(b)); *Roe v. Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973).

155. *See* FED. R. CIV. P. 4, 10 advisory committee notes.

mously. Neither present cases raising the pseudonymity issue nor the Federal Rules of Civil Procedure provide satisfactory guidance.

Accordingly, the author proposes that, at every stage of the proceedings, the court should employ a balancing test that weighs the rights and interests of each litigating party and the interests of the public. The courts should not permit pseudonymous litigation on demand nor categorically disallow it. Very early in the litigation the public will have relatively little interest in the litigants' names. Despite the fact that pleadings and other filings that identify the litigants are historically part of the public record,¹⁵⁶ their accessibility, apart from any judicial decision in the case, does not promote the first amendment values and policy grounds that form the foundation of public rights of access.¹⁵⁷ Consequently, prior to judicial action, a balancing test that reflects the low level of public interest in access and disclosure is appropriate: it should suffice that the litigant show a legitimate interest that is rationally served by pseudonymity. This can be called "cause." Because the historical norm is for litigants to identify themselves, litigants seeking confidentiality should bear this burden of establishing a need for confidentiality.

By contrast, as the proceedings progress and the court decides issues presented by the parties, the values served by public scrutiny of the judicial process attach to an ever greater degree. Access to the identity of the litigants is an ingredient of that public scrutiny. Though not as critical as access to the proceedings, knowing the litigants' identities nevertheless tends to sharpen public scrutiny of the judicial process, to increase confidence in the administration of the law, to enhance the therapeutic value of judicial proceedings, and to serve the structural function of the first amendment by enabling informed discussion of judicial operations. In light of these salutary effects, the balancing test should become more onerous to the party granted pseudonymity and seeking to maintain it, from the time that the court renders any subsequent ruling or enters any subsequent orders requested by any of the parties.

The proposed analysis does not require that, from that point on, the party seeking to maintain confidentiality meet all of the tests of *Press-Enterprise*.¹⁵⁸ If *Press-Enterprise* would require that the litigant demonstrate a high probability of irreparable harm to a compelling or an "over-

156. See *supra* note 133.

157. Similarly, the opposing litigant usually will not have any strong, legitimate first amendment interest in publicizing the identity of his or her adversary. Certainly, an interest in publicizing that information in order to harass the "pseudonymous" party, to deter other potential plaintiffs, or to improperly influence the outcome of the litigation would be unworthy of judicial recognition. But see *infra* text accompanying note 174.

158. See *supra* text accompanying notes 11-14.

riding interest”¹⁵⁹ in order to maintain pseudonymity throughout the litigation, it imposes an excessive burden in view of the limited impairment of public scrutiny that pseudonymity entails.¹⁶⁰ A standard of “reasonable probability of significant harm to an important interest,” if pseudonymity were denied, is more appropriate in light of this limited impairment.¹⁶¹ In theory, the courts should allow only such confidentiality as is necessary to preserve the important interest that has been demonstrated. In the context of pseudonymous litigation, this limitation does not appear to be meaningful. The court either will require that a litigant’s name be disclosed, or it will not. The disclosure is not a matter of degree.¹⁶² The remaining *Press-Enterprise* requirement, that the trial court make findings adequate to support the “closure” on review,¹⁶³ should be applied to the pseudonymity issue.

The public’s first amendment right of access should prevail unless a litigant demonstrates, under the standards set forth above, that his interests in privacy or security justify pseudonymity. This recommendation is labelled the “substantial cause” standard.

The Interests Favoring Confidentiality

In determining whether a litigant has established “cause” or “sub-

159. It is not clear just what that formula requires. See Note, *supra* note 14, at 1846-47 & n.198 (“The court noted in *In re Herald Co.*, 734 F.2d 93, 99 (2d Cir. 1984), that the standard suggested in the *Richmond* plurality—‘an overriding interest articulated in findings,’—‘seems conclusory unless it is intended to invoke the stringent “compelling interest” test required to be met before conduct may be regulated by means that directly impair First Amendment freedom of expression.’” (citations omitted)).

160. See *supra* text accompanying note 92.

161. Cf. *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) [E]ven if the most recent Supreme Court pronouncements on the subject can be said to establish a rule of strict scrutiny, I would hesitate to apply that standard to issuance of a *provisional seal*. Although the strict scrutiny standard applied to closure of criminal trials might appropriately be extended to permanent closure of civil trial records, common sense suggests that a trial court ought to retain the flexibility to issue provisional seals without meeting such an exacting test.

Id. at 1354 (Wright, J., concurring and dissenting). Judge Wright would require the trial court to conclude that the provisional seal was justified by a substantial government interest and that there was no less restrictive means of accommodating that interest. *Id.* A statement by the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), which challenged the statutory disclosure requirements imposed by federal election law, also is pertinent here. The Court said that “[t]he evidence offered need show only a reasonable probability that the compelled disclosure . . . will subject . . . [people] to threats, harassment, or reprisals from either Government officials or private parties.” *Id.* at 74.

162. However, the court should consider the alternative of identifying the litigant and keeping from public scrutiny only those items of information about the litigant that warrant protection.

163. See *supra* text accompanying note 14.

stantial cause," the court should evaluate the magnitude of the pseudonymous party's need to maintain confidentiality and the public interest in his doing so. To make this appraisal, the court must consider a number of factors.

First; *the extent to which the identity of the litigant has been kept confidential*. If the information has been publicized or freely disclosed by the party seeking pseudonymity, there is little privacy to protect. Additionally, the court should consider the feasibility of maintaining confidentiality. Widespread knowledge of the litigant's identity as litigant or of his connection with the matters in controversy renders "confidentiality" relatively impracticable.

Second, *the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases*. Parties usually seek to sue pseudonymously in order to preserve their privacy,¹⁶⁴ their security, or

164. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court recognized a constitutional right of privacy. The Court has since recognized that right to have two components: the right not to disclose private information and the right to make personal decisions. See Comment, *The Constitutional Right to Withhold Private Information*, 77 NW. U.L. REV. 536, 537 (1982) [hereinafter cited as Comment, *Private Information*]; see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first component derives from the first, fourth, fifth, and fourteenth amendments. Comment, *Private Information*, *supra*, at 554. It can be violated by governmental collection and storage of data or by governmental release of data to the public or to other government agencies. *Id.* at 537. Because the courts are part of the government, their forced collection or release of personal data could violate the constitutional right not to disclose private information. If a court were to compel a litigant to disclose his identity or were to release his identity to the public over the litigant's objection, this disclosure could violate the litigant's constitutional right not to disclose private information. See generally Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), 71 GEO. L.J. 219 (1982) [hereinafter cited as Comment, *Perfecting Privacy Analysis*]; Comment, *Private Information*, *supra*.

Several cases illustrate the Court's view of the first component of privacy rights. In *Whalen*, 429 U.S. 589, the Supreme Court first remarked that some of the cases protecting "privacy" as a constitutional right protected "the individual interest in avoiding disclosure of personal matters." *Id.* at 599. The Court implicitly acknowledged that interest was impaired by a state statute that required physicians to disclose to the state the names and addresses of patients and drugs prescribed for them. *Id.* at 593, 600. The patients, or their parents, feared that the state records would be disclosed and would stigmatize those who had taken the drugs. *Id.* at 595 & n.16. The Court held, however, that the statutory scheme did not on its face pose a "sufficiently grievous threat" to this privacy interest to establish a constitutional violation. *Id.* at 600. In so concluding, the Court relied upon two factors: the substantial security measures provided in the statute, and the unlikely possibility that administrators or judges would fail to provide adequate protection against public disclosure. *Id.* at 593-95, 600-02. Compelled disclosure merely to the state was not an impermissible invasion of privacy, the Court said, because it was not significantly different from disclosures required under prior law nor from "other unpleasant invasions of privacy . . . associated with many facets of health care." *Id.* at 602.

The Court affirmed the constitutional nature of the interest in avoiding disclosure of personal matters in *Nixon v. Administrator of Gen. Serv.*, 433 U.S. at 425, 457 (1977), although

both. In evaluating the substantiality of the interests asserted, the courts can take some guidance from cases weighing privacy or security interests in other contexts.¹⁶⁵ As shown below, the privacy and security interests asserted by litigants seeking pseudonymity typically have been within the ambit of the constitutional rights of privacy or liberty.¹⁶⁶ Such interests may override the first amendment based right of public access to judicial

the Court concluded that the particular challenged statute did not unconstitutionally invade Mr. Nixon's right of privacy. Mr. Nixon claimed that the mandated archival screening of certain documents and tape recordings made during his Presidency would violate his privacy rights because the materials contained "extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files." *Id.* at 459. The Court balanced the intrusion upon these privacy interests against the public interest in subjecting Presidential materials to archival screening and ruled against Mr. Nixon. *Id.* at 455-65.

The other component of the right of privacy, the right to make personal decisions, has generated more extensive judicial commentary. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court struck down a statute forbidding the use, or aiding and abetting the use, of contraceptives. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court held that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. In general, the Court has afforded most protection to the right to make autonomous decisions in areas such as marriage, procreation, contraception, family relationships, childrearing, and child education. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a statute prohibiting the distribution of contraceptives to unmarried persons); *Stanley v. Georgia*, 394 U.S. 557 (1969) (invalidating a law prohibiting the private possession of obscene material); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a miscegenation statute); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (affirming the right to decide how to educate one's children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (affirming the decision to marry, establish a family, and rear children). However, the Court has not limited the right not to disclose private information to these fundamental rights. See *Nixon*, 433 U.S. at 465; *Whalen*, 429 U.S. at 599-600. One commentator has argued for a right to avoid disclosure of personal matters, defined as "information 1) that an individual wants to and has kept private or confidential, 2) that except for the challenged government action can be kept private or confidential, and 3) that to a reasonable person would be harmful or embarrassing if disclosed." Comment, *Perfecting Privacy Analysis*, *supra*, at 238-40. This definition is reminiscent of the tort of public disclosure of private information. The matter made public must be one that would be offensive and objectionable to a reasonable person of ordinary sensibilities. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117, at 856-57 (4th ed. 1971).

It is clear then that the courts regard various matters as private and that they recognize a constitutional right, of some dimension, not to disclose private information.

165. *E.g.*, *United States v. Thomas*, 757 F.2d 1359, 1364-65 (2d Cir. 1985) (Impanelling of anonymous jury did not deprive accuseds of due process when court found a serious threat to juror safety reasonably existed and took reasonable precautions to minimize the effect on the jurors' opinions of the defendants.).

166. The interests in freedom from physical abuse, from harassment, and from interference with the practice of an occupation, which typify certain pseudonymity cases, all have roots in the "liberty" that is protected by the fifth and fourteenth amendments to the Constitution. See *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which the court stated that

[liberty denotes] not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those

proceedings.¹⁶⁷

Third, *the magnitude of the public interest in maintaining the confidentiality of the litigant's identity*.¹⁶⁸ Some grounds for seeking anonymity or pseudonymity may be more worthy of public support than others.¹⁶⁹

Fourth, *the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified*. A civil plaintiff could refuse to pursue a case that would require his or her identification. A civil defendant could not "opt out" in this fashion, but could choose not to defend on the merits. The public, however, might have a stake in the litigation that would be ill-served by either of these outcomes.¹⁷⁰ "Voluntary" dismissal of the

privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. And, in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the court stated that [the term liberty] is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Id. at 589.

Disclosures compelled by the government, including the judicial branch, may constitute violations of the rights to privacy and to "liberty," even when the objecting party is concerned primarily about the knowledge thereby made available to, and the hostile reactions of, other private individuals. *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977); *Buckley v. Vallo*, 424 U.S. 1 (1975).

167. *See Waller*, 104 S. Ct. at 2216 (Privacy interests of persons not before the court may justify closing portions of a suppression hearing.); *Press-Enterprise*, 484 U.S. at 512 (Privacy interests of jurors may justify limited closure of voir dire.). It apparently does not matter whether, in other contexts, the Court would characterize as "fundamental" the right of access or some or all of the rights to privacy asserted in these cases. The Court characterizes constitutional rights as "fundamental" or not to determine the stringency of the standard (rationality, intermediate, or strict scrutiny) against which state imposed burdens will be tested. That is not the context here. When there is tension between two constitutional rights, as there is here between rights of access and rights of privacy or liberty, the Court uses a balancing approach. *See, e.g., Waller*, 104 S. Ct. 2210; *Press-Enterprise*, 484 U.S. at 512.

If one were to pit a merely common-law right of access to judicial records against a constitutional right of privacy or liberty, the latter necessarily would prevail. It seems unlikely, however, that the right of access to judicial records will not be recognized to be of constitutional stature, as its close relation, the right of access to judicial proceedings, has been held to be.

168. *See Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979).

169. *Compare infra* text accompanying note 197 (public interests supporting pseudonymity for women who challenge statutes regulating abortion) *with infra* text accompanying notes 200-03 (lesser public interests supporting pseudonymity for doctors making similar challenges).

170. The public has a stake in civil rights litigation, for example, which may be ill-served

action or entry of a default judgment could be worse than the impairment of the public interest in access that would flow from maintaining confidentiality. Consequently, to the extent that such dispositions would not be in the public interest, and would be less desirable than permitting the litigant to sue pseudonymously, there is greater reason for the court to permit and enforce pseudonymity.

Fifth, *whether, because of the purely legal nature of the issues presented, or otherwise, there is an atypically weak public interest in knowing the litigants' identities.*

Sixth, *whether the party seeking to sue pseudonymously has illegitimate ulterior motives.* A plaintiff might seek pseudonymity in an effort to impair defendants' ability to defend themselves.¹⁷¹ A defendant might seek pseudonymity as a diversionary tactic that would delay the litigation and increase its costs to plaintiffs who would oppose the pseudonymity, and to avoid appropriate public scrutiny of defendant's activities.¹⁷² To the extent these are the motivations, no cognizable need for pseudonymity exists.

The Interests Favoring Disclosure

On the other side of the scale, the court should evaluate the interest of the public in knowing the litigants' identities. The court should consider several factors.

First, *the universal level of public interest in access to the identities of litigants.*¹⁷³

Second, *whether, because of the subject matter of the litigation, the status of the litigant as a public figure, or otherwise, there is a particularly*

by a plaintiff's voluntary or involuntary dismissal, or a defendant's default or refusal to defend on the merits. *Cf. Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 904 (7th Cir. 1981) (reversing dismissal of civil rights suit for failure of plaintiffs to comply with discovery, stating that "[i]f there is any merit to the charges of discrimination against minorities . . . the dismissal sanction rests too heavily upon the public"), *cert. denied*, 455 U.S. 1017 (1982); *Keller v. Hilgendorf*, 79 F.R.D. 687, 689 (E.D. Wis. 1978) (Because dismissal of a § 1983 action for plaintiff's failure to answer deposition questions would substantially undercut § 1983, refusal to answer based upon fifth amendment privilege would not result in dismissal unless questions posed were central to the plaintiff's claims.).

171. This motivation was charged in *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979). See *infra* note 340.

172. Consider, for example, the case of *Doe v. A. Corp.*, 709 F.2d 1043 (5th Cir. 1983), discussed *infra* text accompanying notes 360-68.

173. *Waller*, 104 S. Ct. at 2217 n.9 ("While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real."). The Court also cited a case that spoke of "the great, though intangible, societal loss that flows" from closing courthouse doors. *Id.* (quoting *People v. Jones*, 47 N.Y.2d 409, 416, 391 N.E.2d 1335, 1340, 418 N.Y.S.2d 359, 364, *cert. denied*, 444 U.S. 946 (1979)).

strong public interest in knowing the litigants' identities, beyond the public interest that normally obtains.

Third, *whether the opposition to pseudonymity by counsel, the public, or the press is illegitimately motivated.* In particular, an opposing party might be motivated by a desire to harass the party seeking to keep his identity confidential and to force that party to drop his or her lawsuit or defense in order to avoid disclosure. To the extent that the opposition to pseudonymity is illegitimately motivated, no cognizable need for disclosure exists.

When a plaintiff seeks to keep his identity confidential from his adversary in litigation, as well as from the public, the court should also consider the defendant's need for that information in order adequately to prepare his defense.¹⁷⁴ In some situations, information about a plaintiff other than identity or identifying traits would suffice to enable a defendant to defend effectively. When the issues raised by a case are purely legal, for example, defendants do not need information about a plaintiff beyond that which determines whether plaintiff has standing and whether a case or controversy exists.¹⁷⁵ In cases in which the claims are dependent on factual issues peculiar to plaintiff's case, however, the defendant's need to know his adversary's name may be such that refusal to surrender that information would deny the defendant procedural due process.¹⁷⁶ Pseudonymity "may cause problems to defendants engaging in discovery and establishing their defenses, and in fixing res judicata effects of judgments."¹⁷⁷ The nature of the issues presented in each case will determine whether pseudonymity vis-a-vis the litigation opponent will pose such problems.

If a litigant, whether plaintiff or defendant, seeks to keep his identity confidential from the courts, the judge must determine whether factors peculiar to the functions of the court and the judicial system justify requiring the litigant to reveal his true identity.¹⁷⁸ It may be necessary for

174. It is doubtful that a defendant could keep his identity confidential from the plaintiff, because the plaintiff must have identified the defendant in order to commence the lawsuit. If there is a way for a plaintiff to sue without identifying the defendant, the analysis in the text would apply by analogy.

175. *Campbell v. United States Dep't of Agriculture*, 515 F. Supp. 1239, 1246 (D.D.C. 1981).

176. See *supra* note 137 & accompanying text.

177. *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979), *cert. denied*, 444 U.S. 856 (1979).

178. Some information about a plaintiff is necessary to enable the court to rule on disputed questions such as whether the plaintiff has standing to sue, whether the "case or controversy" requirement is met, and, in a class action, whether the plaintiff can adequately represent the proposed class. This information can be restricted to the court, or to the court and defendant's

the court to know the litigant's identity in order to ascertain whether he has kept confidential both his identity as a litigant and his connection with the matters in controversy. In some circumstances, knowing the litigant's name also may aid the court in assessing the strength of the grounds for pseudonymity and in judging whether there are illegitimate or ulterior motivations behind the request.

Applying the Proposed Approach to Decided Cases

This section examines in some detail the types of cases in which pseudonymity has been sought,¹⁷⁹ illustrates the application of the proposed balancing approach to each category of cases, and identifies the important competing interests in each factual setting. A review of the cases addressing the question of pseudonymity reveals that they tend to fall into one or more of several subject matter categories. Those categories are used here as an organizing principle, although the analysis proposed above cuts across these groupings. The areas of federal litigation in which pseudonymity most commonly has been sought involve: reproductive rights; homosexuality and transsexuality; mental illness or deficiency; drug use; criminality and unprofessional conduct; juveniles, including delinquents, neglected, abused, and illegitimate children; public aid; fears of bodily injury or economic or professional reprisal for activity in the litigation; and corporate defendants who fear disclosure of business information.¹⁸⁰ The underlying concerns range across a spectrum from privacy interests to concerns about physical, emotional, and economic security.

Reproductive Rights

Perhaps the best examples of the use of pseudonyms in cases involving reproductive rights are cases challenging the constitutionality of statutes regulating abortion. In most of these cases, federal district courts permitted the plaintiffs to proceed pseudonymously without any published discussion of the reasons for, or methods of implementing, the de-

counsel. The fact that defendant makes an issue of these matters does not mean that a plaintiff should be denied a pseudonym vis-a-vis the public, nor even, necessarily, vis-a-vis the defendant or the court. *See Campbell v. United States Dep't of Agriculture*, 515 F. Supp. 1239, 1246 (D.D.C. 1981); *Doe v. Matthews*, 420 F. Supp. 865, 873 (D.N.J. 1976).

179. In the vast majority of pertinent cases the courts have allowed, and perhaps sometimes disallowed, pseudonymity without analysis and consideration of the competing interests in access. If analysis was done, it was not reflected in published opinions.

180. In state court proceedings, there are some additional categories of cases in which pseudonymity and similar identity hiding devices have been used with some frequency. *E.g.*, *C. v. C.*, 320 A.2d 717 (Del. 1974) (a divorce action).

cision.¹⁸¹ *Doe v. Deschamps*¹⁸² contains one of the most thorough discussions. In *Deschamps*, a pregnant woman and her doctor sued as Jane Doe and John Moe, respectively, to challenge the constitutionality of Montana's abortion laws. After noting the recent practice of permitting individuals to sue under fictitious names "where the issues involved are matters of a sensitive and highly personal nature,"¹⁸³ the court opined that

[l]awsuits are public events and the public has a legitimate interest in knowing the facts involved in them. Among those facts is the identity of the parties. We think that as a matter of policy the identity of the parties to a lawsuit should not be concealed except in the unusual case. The intensely personal nature of pregnancy does, we believe, create an unusual case, and in such a case the general policy of full disclosure may well give way to a policy of protecting privacy in a very private matter. The doctor-plaintiff, however, does not bring his personal life into the lawsuit. If a person, free to choose, intends to do a future act which relates to his professional or economic life, we see no reason to grant to him the privilege of anonymity in an action brought to determine the legality of that future act.¹⁸⁴

More frequently, the court's discussion of pseudonymity is fragmentary. Thus, in *Bossier City Medical Suite, Inc. v. City of Bossier City*,¹⁸⁵ the court allowed "Louise Doe," a pregnant woman, to act as class representative in a suit against a city zoning department, which alleged discrimination in the denial of a zoning certificate for an abortion clinic. The court simply noted that "[t]he chilling effect of publicly airing so private a matter as the decision to terminate a pregnancy may well preclude a woman from seeking vindication of her constitutional rights in

181. See, e.g., *Christensen v. Wisconsin Medical Bldg.*, 551 F. Supp. 565 (W.D. Wis. 1982); *Doe v. Busbee*, 471 F. Supp. 1326 (N.D. Ga. 1979); *Doe v. Matthews*, 420 F. Supp. 865, 873 (D.N.J. 1976); *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla.), *aff'd per curiam*, 417 U.S. 279 (1974); *Poe v. Charlotte Memorial Hosp.*, 374 F. Supp. 1302 (W.D.N.C. 1974); *In re Guardianship of Barbara Boe*, 322 F. Supp. 872 (D.D.C. 1971); *Doe v. Dunbar*, 320 F. Supp. 1297 (D. Colo. 1970); *Doe v. Randall*, 314 F. Supp. 32 (D. Minn. 1970), *aff'd sub nom. Hodgson v. Randall*, 402 U.S. 967 (1971).

182. 64 F.R.D. 652 (D. Mont. 1974) (per curiam).

183. *Id.* at 653. An early and noteworthy state court case is *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508 (1959), *appeal dismissed*, 367 U.S. 497 (1961), in which plaintiffs, a physician and several of his patients, challenged the constitutionality of state legislation that forbade the use and prescription of contraceptives. The court said:

Because of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would wish to be anonymous. . . . The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.

Id. at 60, 156 A.2d at 514-15.

184. *Deschamps*, 64 F.R.D. at 653.

185. 483 F. Supp. 633 (W.D. La. 1980).

Federal court.”¹⁸⁶

Because the use of pseudonyms generally has not been appealed, federal appellate decisions on reproductive rights typically contain no discussion of the issue or merely note the use of fictitious names.¹⁸⁷ In *Doe v. Poelker*,¹⁸⁸ a case challenging policies and procedures that limited the availability of nontherapeutic abortions in city hospitals, the Eighth Circuit commented that the plaintiff's pseudonym had been used throughout the litigation “to avoid harassment due to the controversial nature of the subject matter of this action.”¹⁸⁹ And, in *Indiana Planned Parenthood Affiliates Association v. Pearson*,¹⁹⁰ in which plaintiffs challenged a procedure for bypassing the prohibition against physicians performing abortions on unemancipated minors without prior parental notification, the court observed that “it is doubtful that a case involving waiver of notification is a matter of general public interest, because . . . only the minor, the parents, and the abortion provider have an interest in the case. For reasons of confidentiality, the public is not even supposed to know the identity of the minor.”¹⁹¹

In most abortion cases, there was no vigorous opposition to pseudonymity, so the courts were not pressed to analyze the issue thoroughly. A more complete analysis, which should be sufficiently elastic to account for factual variables, appears below.

Cases litigating abortion issues present strong interests favoring con-

186. *Id.* at 644 (citations omitted). For cases not on abortions but other aspects of reproductive rights and sexual privacy, see *Doe v. Delaware*, 450 U.S. 382 (1981) (per curiam) (parental rights of half brother and sister); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983) (women who had been strip searched allowed to sue pseudonymously); *Doe v. United States*, 718 F.2d 1039 (11th Cir. 1983) (rape victim allowed to sue pseudonymously in civil action); *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (rape victim allowed to sue pseudonymously in civil action). The Supreme Court in *Press-Enterprise* indicated that a juror's privacy interest in the information that she, or a member of her family, had been raped, but had declined to seek prosecution because of the embarrassment and emotional trauma that would flow from disclosure would be a “legitimate” interest that could properly lead to a limited closure of voir dire. *Press-Enterprise*, 464 U.S. at 512.

187. See, e.g., *Akron Center For Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1210 (6th Cir. 1981), *aff'd in part & rev'd in part*, 462 U.S. 416 (1983); *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 645 (4th Cir. 1975); *Doe v. Ceci*, 517 F.2d 1203 (7th Cir. 1975); *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd mem.*, 428 U.S. 901 (1976); *Noe v. True*, 507 F.2d 9 (6th Cir. 1974) (per curiam); *Doe v. Hale Hosp.*, 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe v. General Hosp. of D.C.*, 434 F.2d 427 (D.C. Cir. 1970) (class action);

188. 515 F.2d 541 (8th Cir. 1975), *rev'd per curiam on other grounds*, 432 U.S. 519 (1977).

189. *Id.* at 542 n.1.

190. 716 F.2d 1127 (7th Cir. 1983).

191. *Id.* at 1136 (footnote omitted). This was not said in the context of discussing the pseudonyms, however.

fidentiality. In most such cases, the litigants' identities have been kept confidential. The first question, then, is the substantiality of the bases upon which the litigant seeks to avoid identification. A pregnant woman's desire to keep confidential the fact that she seeks an abortion concerns a fundamental right.¹⁹² The United States Supreme Court has held that the constitutional right to make personal decisions encompasses a woman's decision to terminate her pregnancy.¹⁹³ There is thus no question that, although the state has an interest in the decision, this decision is recognized as a personal matter that affects the physical, psychological, and economic welfare of the woman.¹⁹⁴

Additionally, the decision to abort a fetus—indeed, the right of individuals to decide to abort—is a very controversial matter in our society and can stigmatize the woman. Additional stigma may attach to unmarried women and those who seek public funding or facilities for abortions.¹⁹⁵ Acts of harassment against women who plan, or have had, abortions are not uncommon.¹⁹⁶ Under these circumstances, a reasonable person could regard disclosure of her decision to challenge abortion laws as embarrassing and harmful.

Because women have a qualified constitutional right to terminate their pregnancies, there is also a public interest in maintaining the confidentiality of these women litigants' identities. As recognized in *Bossier City*, without such confidentiality women would be deterred from suing to vindicate their constitutional rights. By the same token, the "voluntary" dismissal of these lawsuits, which might follow from requiring pregnant plaintiffs to disclose their names publicly in order to pursue the suits, would not advance the vindication of constitutional rights.¹⁹⁷ There is no indication in the cases that the women sought to sue pseudonymously for any illegitimate ulterior motives. In addition, the public interest in access to these litigants' names is atypically weak because they

192. *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

193. *Id.* at 153.

194. *Id.*

195. *See infra* text accompanying notes 304-15.

196. *See* F. JAFFE, B. LINDHEIM & P. LEE, *ABORTION POLITICS, PRIVATE MORALITY AND PUBLIC POLICY* 237-38 (1981) (describing harassment of patients, an invasion of an operating room that frightened and possibly endangered a patient, children chasing women leaving an abortion clinic and shouting "murderers," and attacks on abortion clinics from vandalism to arson); K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 217 (1984) (noting attacks on abortion clinics by arsonists); L. WARDLE & M. WOOD, *A LAWYER LOOKS AT ABORTION* 79, 81 (1982) (noting arguments against spousal participation requirements).

197. Some women, of course, would not be deterred by a disclosure requirement. Moreover, insofar as doctors are granted standing to assert the same or different claims also leading to the invalidation of unconstitutional abortion legislation, the constitutional rights involved would be vindicated. *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973).

sue as fungible members of a class, whether or not the suit technically is framed as a class action. They challenge statutes and government policies as facially unconstitutional. In such instances, neither first amendment values nor the other policies supporting openness are substantially served by identification of the litigant, unless she is a public figure. Ignorance of the plaintiff's identity will not make public discussion less informed or substantially reduce the therapeutic value for the community. When the issues presented are purely legal questions of interpretation and constitutionality that will affect a whole class of persons, it is relatively unlikely that judicial bias or partiality toward the plaintiff will affect the decision. Accordingly, pseudonymity should not undermine public confidence in the administration of the law. Nor will the public's inability to identify the plaintiff be likely to affect the availability of relevant testimony. Consequently, the public interest in access to the plaintiff's name is especially weak.

As indicated, the interests favoring disclosure in these cases are not compelling. While there is great societal interest in the issue of abortion generally and in the validity of particular abortion legislation, there is no extraordinary public interest in knowing the identities of individual women who have initiated challenges. Certainly, a desire for identifying information for the purpose of intimidating, harassing or retaliating against plaintiffs is illegitimate motivation, which the courts should not respect.

On balance, then, pseudonymity ordinarily should be granted to pregnant women challenging abortion legislation, and in fact, it has been. Such women usually will have demonstrable "substantial cause" to keep their identities confidential from the public.

The cases indicate little about whether these women sought to keep their identities confidential from the defendants or from the courts, whether the defendants actively sought the information, or whether the courts cared to insist upon it. At least some courts have been satisfied to accept pseudonymous affidavits to establish the plaintiff's existence and her pregnant state at the commencement of the action, so as to establish standing and a constitutional case or controversy.¹⁹⁸ This procedure is adequate to satisfy the needs of the judicial system in these areas. Moreover, because the issues raised on the merits of these cases are essentially legal issues—the constitutionality of particular regulations—the identity of the plaintiff is not essential for *res judicata* or collateral estoppel pur-

198. *E.g.*, *Doe v. Poelker*, 497 F.2d 1063, 1065 n.2 (8th Cir. 1974), *rev'd on other grounds*, 432 U.S. 519 (1977); *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508, 515 (1959), *appeal dismissed*, 367 U.S. 497 (1961).

poses. Because these cases usually turn on legal issues and factual matters not peculiar to the plaintiff, the defendants ordinarily will not have a great need to know the plaintiff's identity in order to adequately defend the case.¹⁹⁹

A second pseudonymity issue in the abortion cases involves doctors seeking to use fictitious names when challenging abortion regulations. Here, the balance is different. The doctors' personal privacy is not at stake. Rather, the litigating doctors' desire for anonymity is predicated on their concern that their advocacy of abortion will be unpopular, and hence will adversely affect their professional status and economic well-being. This is a security concern, broadly defined. In some circumstances, the doctors' allegations, made to establish their standing to sue, might also subject them to the risk of criminal prosecution.²⁰⁰ Moreover, because physicians have a right to practice their profession without undue infringement by the state,²⁰¹ there is also a public interest in maintaining the confidentiality of physicians' identities if they otherwise would be deterred from suing when necessary to vindicate their rights.²⁰²

The interests favoring disclosure include the universal public interest in access to litigants' identities, weakened to the extent that purely

199. In *Doe v. Poelker*, 497 F.2d 1063, 1065 n.2 (8th Cir. 1974), the court noted that Doe was ready and able to appear for deposition or other discovery procedures. However, this does not necessarily imply that her name would be among the factual information to be made available to the defendant. *Id.*

200. In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court held that plaintiff physicians had standing to contest the constitutionality of Georgia's abortion law that required a physician to submit her or his individual judgment to committee approval. *Id.* at 188. The physicians alleged that this law chilled and deterred them from practicing their profession and deprived them of rights guaranteed by the first, fourth, and fourteenth amendments. *Id.* at 186. The Court concluded that:

The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Id. at 188 (citations omitted).

201. See *id.* at 199-200.

202. Some physicians, however, would not be deterred by a disclosure requirement. Moreover, insofar as pregnant women have standing to assert the same or different claims also leading to the invalidation of unconstitutional abortion legislation, the physicians' rights involved still would be vindicated. See, e.g., *id.* at 187. Although one might read *Bolton* to indicate that certain aspects of Georgia's abortion law were stricken only because of the doctors' rights, see *id.* at 198-200, the Court has explained in a later opinion that if the statutory restrictions on abortion procedures "had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution." *Whalen v. Roe*, 429 U.S. 589, 604-05 n.33 (1977).

legal issues are posed, but strengthened by the additional public interest that might attach by virtue of the nature of the litigation and doctors' service role in society. The public has an interest in knowing the identity of doctors who champion causes such as abortion because patients have a right to choose not to associate with physicians who hold views they find abhorrent. They cannot exercise that right if they cannot determine which doctors champion such views. Consequently, there is a particular public interest in knowing doctors' identities in these cases. Indeed, the public's interest in knowing is precisely the converse of doctors' fear of disclosure because of its potential economic and professional ramifications. In these situations, the patients' interests are superior.²⁰³

If disclosure of a doctor's identity would also subject him to a serious risk of violent retaliation, however, resolving the issue of disclosure becomes more complicated. As a practical matter, a court could not limit access to the doctor's identity to persons with peaceful and proper purposes while denying access to persons with illegal designs. The court must hold either the risks to the doctor or the public interest in disclosure paramount. Pseudonymity for the doctor also may be appropriate when the suit entails a risk of criminal prosecution. In other contexts, the courts have allowed plaintiffs to sue by pseudonym to protect their fifth amendment right not to incriminate themselves.²⁰⁴ That principle, if valid, should apply to similarly situated doctors.²⁰⁵

Homosexuality and Transsexuality

There are a few cases in which transvestites, transsexuals, or persons who had engaged in homosexual conduct sued under pseudonyms to challenge adverse actions taken against them. As in cases involving abortion, there is little significant discussion of reasons supporting the pseudonymity.²⁰⁶ One recent district court case briefly discussed the is-

203. See, e.g., *Deschamps*, 64 F.R.D. at 653.

204. See, e.g., *Doe v. Miller*, 573 F. Supp. 461 (N.D. Ill. 1983), discussed *infra* text accompanying note 262-63.

205. The validity of the fifth amendment argument, however, is in doubt. The Supreme Court's reasoning in a recent case, *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 104 S. Ct. 3348 (1984), described *infra* note 270, might apply by analogy: compelling physicians to identify themselves when alleging their violation of abortion laws does not violate their fifth amendment rights because the physicians are under no compulsion to bring suit—they could rely on women seeking abortions to do so. Furthermore, they can challenge the constitutionality of the abortion laws in any criminal proceedings brought against them. Yet the Supreme Court has held that physicians seeking to overturn abortion legislation should not be required to await and undergo criminal prosecution as the sole means of seeking relief. *Doe v. Bolton*, 410 U.S. 179 (1983).

206. See, e.g., *Doe v. Department of Transp.*, 412 F.2d 674, 675 (8th Cir. 1969) (challeng-

sue. In *Doe v. McConn*,²⁰⁷ a challenge to a city ordinance making it unlawful to appear in public dressed as a member of the opposite sex, the court did explain that the transvestite plaintiffs were using fictitious names in order "to insulate themselves from possible harassment, to protect their privacy, and to protect themselves from prosecution resulting from this action."²⁰⁸

Applying the proposed analysis to this situation, there is no suggestion in the cases that the plaintiffs were commonly known to be homosexuals, transsexuals, or transvestites. If that fact was well known, however, the plaintiffs had little privacy interest to protect.²⁰⁹ Assuming that the plaintiffs had kept their sexual or clothing preferences and their sexual histories confidential, the next question is how substantial the bases were upon which they sought pseudonymity. Thus far, most courts have rejected arguments that the constitutional rights of privacy to make personal decisions encompasses a right to engage in homosexual conduct.²¹⁰

ing denial of medical certificate necessary for pilot's license because of homosexual activities and conviction for sodomy); *Doe v. Alexander*, 510 F. Supp. 900 (D. Minn. 1981) (transsexual challenged Army medical regulations disqualifying transsexuals from service); *McClure v. Harris*, 503 F. Supp. 409, 412 n.3 (N.D. Cal. 1980) (plaintiff who was denied reimbursement for a sex-change operation, challenged certain medicare hearing procedures), *rev'd sub nom.* *Schweiker v. McClure*, 456 U.S. 188 (1982); *Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975) (challenging constitutionality of statute that made sodomy a crime), *aff'd mem.*, 425 U.S. 901 (1976); *Doe v. Chaffee*, 355 F. Supp. 112 (N.D. Cal. 1973) (homosexual challenged validity of his undesirable discharge from the Navy); *see also* *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968) (challenging discharge from civil service position for alleged homosexual conduct), *cert. denied*, 393 U.S. 1041 (1969).

207. 489 F. Supp. 76 (S.D. Tex. 1980).

208. *Id.* at 77.

209. In *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118 (10th Cir. 1979), *cert. denied*, 444 U.S. 856 (1979), Lindsey was arrested by defendant store's security guard for allegedly attempting to persuade him to engage in a homosexual act in the men's room. Thereafter, Lindsey was acquitted in a state criminal action. He then sued claiming false imprisonment, malicious prosecution, assault and battery, slander, and civil rights violations. *Id.* at 1120. He attempted to sue pseudonymously, but the court clerk refused to accept the complaint and a judge concurred with the clerk. Lindsey then substituted his true name and appealed the judge's decision. The Tenth Circuit concluded that there had been no abuse of discretion. The court stated that there did not seem to be "a social interest in the concealment of [plaintiff's] identity." *Id.* at 1125. Furthermore, "Lindsey had already suffered the worst of the publicity and embarrassment by being named a defendant in a state criminal trial . . . [T]he only way his reputation can be restored . . . is by a court ruling *in his favor and name* on his claims." *Id.* (emphasis added). This is consistent with the argument that one has little privacy to lose if his name already has become publicly associated with embarrassing facts.

210. In a case summarily affirmed by the Supreme Court, one district court upheld a statute making homosexual conduct a crime, after finding that homosexual conduct bears no relation to marriage, procreation, or family life. *Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). In 1984, the Court of Appeals for the District of Columbia also rejected the argument. *Dronenberg v. Zech*, 741 F.2d 1388, 1391-97 (D.C. Cir. 1984).

A shift has begun however; the Eleventh Circuit now has held that a Georgia sodomy statute infringed upon fundamental constitutional rights of practicing homosexuals, and that, in order to establish the statute's validity, the state would be required to demonstrate a compelling interest in regulating the proscribed conduct.²¹¹ There is no recognized constitutional right to become a transsexual or to behave as a transvestite.²¹² Nonetheless, people may have a right not to disclose their sexual histories and preferences, and a strong interest in nondisclosure. Matters of sexual identity and sexual preference are exceedingly personal. Moreover, homosexuality traditionally has been condemned in this country and many people attach stigma to homosexual conduct.²¹³ Similarly, while sex-change operations are too new to carry a long history of condemnation and stigma, the experience of homosexuals and transvestites strongly indicates a similar public response. Further, the stigma attaching to those whose sexual conduct does not conform to the mainstream has often been accompanied by physical violence.²¹⁴ In addition, when homosexual activity or transvestism is unlawful, the disclosure of identity can subject individuals to the risk of prosecution. For these reasons,

211. *Hardwick v. Bowers*, 760 F.2d 1202, 1212-13 (11th Cir.), *cert granted*, 54 U.S.L.W. 3292 (U.S. Nov. 5, 1985) (No. 85-140). Courts also have found that other forms of discrimination against homosexuals violated various constitutional rights. *See, e.g.*, *Gay Alliance v. Matthews*, 544 F.2d 162, 167 (4th Cir. 1976) (refusal to allow homosexual student group equal access to state university facilities invalidated under first amendment); *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 969, 973-77 (E.D. Wis. 1980) (regulation requiring discharge based on homosexual tendencies, desire, or interest, without overt acts, held unconstitutional under first and ninth amendments and right to privacy.). *See generally* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) (arguing that courts should recognize homosexuality as a suspect classification under the equal protection clause of the fourteenth amendment and should subject laws that discriminate on the basis of sexual preference to heightened scrutiny).

212. The cases typically have involved allegations that discrimination based on transsexuality violated Title VII. 42 U.S.C. §§ 2000e to 2000e-15 (1982). *E.g.*, *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (*per curiam*); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

213. *Droneburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Bray v. United States*, 515 F.2d 1383, 1391 (Ct. Cl. 1975) (*per curiam*); *see Boutilier v. INS*, 387 U.S. 118, 122 (1967) (A homosexual alien was excludable under the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251 (1982), as one "afflicted with [a] psychopathic personality"; Congress' purpose was to exclude "all homosexuals and other sex perverts.").

214. *Rowland v. Mad River Local School Dist.*, 105 S. Ct. 1373, 1377 (1985) (Brennan, J., dissenting) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility"); CALIFORNIA COMM'N ON PERSONAL PRIVACY, REPORT OF THE COMM'N 341, 375-85 (1982); Paul, *Minority Status for Gay People: Majority Reaction and Social Context*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 359-61, 368, 369 n.10 (1982).

a reasonable person challenging related laws or policies would regard disclosure of such sexual conduct as embarrassing and harmful. In addition, the claims being asserted are substantial; they present issues seriously affecting the claimants' quality of life. It would not be in the public interest to deter these plaintiffs from bringing their suits by categorically requiring them to sue in their true names or not at all.

The interests in pseudonymity must be balanced against the interests in disclosure in these cases. When purely legal questions are presented, the public interest in party identification is low.²¹⁵ The public interest in access is arguably supplemented by a particular interest in knowing the identity of homosexuals, transsexuals, and transvestites in the community. Those heterosexuals who so choose would then be free to avoid their company. Absent a ground for avoidance beyond moral condemnation, however, the author's view is that there is no supplemental public interest in access to which the courts should defer. As was true with doctors, the balance is affected dramatically when disclosure of identity would subject the homosexuals, transsexuals, or transvestites to a serious risk of violent retaliation to person or property.²¹⁶

Courts and defendants will not have a strong interest in knowing these plaintiffs' identities when purely legal issues are presented. To the extent that claims are dependent on factual issues peculiar to plaintiff's case, however, the need will be greater. The federal cases in this area do not reflect any debate over these issues.

Mental Illness or Deficiency

Typically, as in the other categories of cases examined thus far, cases involving mental illness or deficiency at most briefly mention the interests supporting pseudonymity.²¹⁷ Some cases note the use of ficti-

215. See *supra* text accompanying notes 197-98.

216. The balance also is affected when a denial of pseudonymity would impose a risk of criminal prosecution. See *supra* text accompanying notes 204-05.

217. Cases allowing pseudonyms without discussion include: *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981); *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979); *Koe v. Califano*, 573 F.2d 761 (2d Cir. 1978); *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Woe v. Cuomo*, 559 F. Supp. 1158 (E.D.N.Y. 1983), *rev'd*, 729 F.2d 96 (2d Cir.), *cert. denied*, 105 S. Ct. 339 (1984); *Doe v. Harris*, 495 F. Supp. 1161 (S.D.N.Y. 1980); *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979); *Doe v. Gallinot*, 486 F. Supp. 983 (C.D. Cal. 1979), *aff'd*, 657 F.2d 1017 (9th Cir. 1981); *Doe v. Lally*, 467 F. Supp. 1339 (D. Md. 1979); *Woe v. Mathews*, 408 F. Supp. 419 (E.D.N.Y. 1976), *aff'd mem. sub nom. Woe v. Weinberger*, 562 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1048 (1978).

There are also cases in which a deformed child who is technically not a party to the

tious names to protect the plaintiffs' privacy,²¹⁸ or to avoid public embarrassment or ridicule.²¹⁹ In others, the courts recognize the stigma or the adverse economic ramifications of being labelled "mentally ill."²²⁰ In at least one instance, a state court held that when public identification of the plaintiff would jeopardize her emotional stability and continued employment, the court could properly exercise its discretion to grant plaintiff's motion to suppress her name from public disclosure.²²¹

In weighing the interests favoring confidentiality, none of the cases suggests that the plaintiffs had failed to keep confidential their status as mentally ill persons. Assuming that confidentiality had been maintained, the next question is the substantiality of the bases for nondisclosure of their names. Obviously, public disclosure of a person's mental illness, emotional problems, or intellectual deficiencies often would be humiliating.²²² It is equally true that the mentally ill or deficient are stigmatized.²²³

litigation is referred to by pseudonym only. *See, e.g.,* *United States v. University Hosp., State Univ. of N.Y. at Stony Brook*, 729 F.2d 144 (2d Cir. 1984).

218. *E.g., Doe v. Lawson*, 579 F. Supp. 1314, 1315 n.1 (D. Mass.), *aff'd mem.*, 745 F.2d 43 (1st Cir. 1984) (Parents of a severely retarded child challenged proposed change of his educational placement under the Education of the Handicapped Acts, 20 U.S.C. §§ 1401-1461 (1982).); *Doe v. Syracuse School Dist.*, 508 F. Supp. 333 (N.D.N.Y. 1981) (Plaintiff claimed school district failed to hire him as a teacher's assistant and substitute teacher because of his prior mental illness, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982).); *Doe v. Bodwin*, 119 Mich. App. 264, 326 N.W.2d 473, 474 (1982).

219. *See Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1120 (D. Hawaii 1976) (challenge to constitutionality of state mental health law), *aff'd in part & rev'd in part sub nom. Suzuki v. Yven*, 617 F.2d 173 (9th Cir. 1980).

220. *See Doe v. Anker*, 451 F. Supp. 241, 249-50 (S.D.N.Y. 1978), *cert. denied*, 446 U.S. 986 (1980) (Tenured teacher sued alleging violation of his constitutional and statutory rights in his placement on involuntary health leave and in the termination of his employment upon a finding that he was unfit to teach by reason of mental illness, schizophrenia, and severe emotional disturbance. The court agreed that plaintiff had been denied a liberty interest in his good name and reputation as a person presumably free from mental disorder, without due process of law.).

221. *Doe v. Bodwin*, 119 Mich. App. 264, 326 N.W.2d 473 (1982) (Plaintiff desired to avoid the sensational publicity that would accompany her allegation that a prominent psychologist had had sexual intercourse with her during therapy.).

222. *See, e.g., Lora v. Board of Educ.*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977). Society's respect for privacy in this realm is manifested in the widespread recognition of a psychotherapist-patient privilege. *See* C. McCORMICK, EVIDENCE § 98 (3d ed. 1984).

223. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 601 (1979) ("what is truly 'stigmatizing' is the symptomatology of a mental or emotional illness"); *Addington v. Texas*, 441 U.S. 418, 429 (1979) (a victim of debilitating mental illness not free of stigma); *Johnson v. Solomon*, 484 F. Supp. 278, 284 n.4, 287 (D. Md. 1979) (Stigmatization can arise from involuntary commitment to a mental hospital.); *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 39 (E.D. Pa. 1978) ("stigma attaches to institutional commitment whether the juvenile is classified as mentally ill or mentally retarded" (footnotes omitted)), *rev'd on other grounds*, 442 U.S. 640 (1979); *Stamus v. Leonhardt*, 414 F. Supp. 439, 449 (S.D. Iowa 1976) ("the legal and

There is a considerable public interest in maintaining the confidentiality of these litigants' identities, for preventing such stigma is in the public interest as well as the litigants' private interest. Moreover, name protection may be essential to avoid deterring the allegedly mentally ill or deficient, or their families, from suing to vindicate established rights or to establish new rights. Name protection also may be a factor in encouraging the mentally ill and deficient to seek and participate fully in treatments and programs intended for their benefit.²²⁴ Pseudonymity in treatment-related litigation would be part of the larger confidentiality surrounding treatment programs. Finally, it often would not be in the public interest for these plaintiffs to drop their lawsuits in order to preserve their privacy, for the challenges they bring benefit society at large. If emotionally disturbed or retarded children are not educated, all society loses from their lessened abilities; if committed persons are given only custodial care and not treatment, all society loses from their lessened ability to work and to contribute.

The chief interest favoring disclosure is the general public interest in access to litigants' names. There would not seem to be any extraordinary public interest grounded in the nature of the litigation. Out of ignorance or fear, some people might desire to avoid association with, or to harass, the mentally ill or deficient, but those are not interests the court should respect. If a particular individual who is a danger to others is free in the community, that fact could furnish a reason to deny pseudonymity, though far more effective protections should be afforded in such a case. The public does have a particular interest in litigation that involves the expenditure of public funds.²²⁵ That public interest in the litigation is little served, however, by knowledge of the claimant's name. Thus, the mentally ill and deficient often can establish "substantial cause" to sue pseudonymously.

There is little indication in the cases as to whether the plaintiffs sought to keep their identities confidential from the defendants or the

social consequences of commitment constitute a stigma of mental illness which can be as debilitating as that of criminal conviction" (citations omitted)). See generally Gove & Fain, *The Stigma of Mental Hospitalization*, 28 ARCHIVES OF GEN. PSYCHIATRY 494 (1973); Schwartz, Myers, & Astrachan, *Psychiatric Labeling and the Rehabilitation of the Mental Patient*, 31 ARCHIVES OF GEN. PSYCHIATRY 329 (1974).

224. See, e.g., *Doe v. Anker*, 451 F. Supp. 241 (S.D.N.Y. 1978); *Doe v. Bodwin*, 119 Mich. App. 264, 326 N.W.2d 473 (1982).

225. It does so, for example, when the appropriateness of the education plan for a handicapped child is at issue, when persons who have been civilly committed seek additional procedural safeguards, when patients seek to improve conditions in institutions, and when patients seek reimbursement for expenses incurred for their care. See *supra* notes 217-19.

court.²²⁶ For cases in which the qualities of a particular individual are central, such as those involving children's personalized education plans, there is a strong argument for access by the defendant and the court to the plaintiff's name. As previously noted, when a case presents a pure legal issue there is much less need for such disclosure.

Drug Use

A fourth category of cases in which plaintiffs have sought to sue pseudonymously are those involving plaintiffs' legal or illegal use of drugs. In some of the cases, plaintiffs sought reform of laws criminalizing drug use; in others, they sought to learn what information the government had about their drug use; in a few instances, plaintiffs challenged reporting requirements.²²⁷ The factors favoring confidentiality include the fact that plaintiffs apparently had kept their drug use and their lawsuits confidential.²²⁸ The plaintiffs' wish for pseudonymity was based in part on the desire for privacy with respect to health, medical treatments, or drug use.²²⁹ Plaintiffs were concerned also about the stigma that attaches to drug users.

These grounds for desiring to sue pseudonymously are often substantial. The Supreme Court in *Whalen v. Roe*²³⁰ recognized that mandatory disclosure to the government of legal use of particular prescription drugs is an invasion of privacy, although not necessarily impermissible.²³¹ Whether a reasonable person would regard disclosure of drug use as embarrassing or harmful, however, depends on the drug in question.²³² As the Second Circuit noted in another case, "[i]t is immate-

226. There are exceptions. *E.g.*, *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1120 (D. Hawaii 1976) (mentioned that plaintiff's identity had been made available to the court).

227. *See, e.g.*, *Roe v. Ingraham*, 480 F.2d 102, 107 (2d Cir. 1973); *Doe v. United States Dep't of Justice*, 93 F.R.D. 483, 484 (D. Colo. 1982); *Louisiana Affiliate of Nat'l Org. for Reform of Marijuana Laws v. Guste*, 380 F. Supp. 404, 405 (E.D. La. 1974), *aff'd mem.*, 511 F.2d 1400 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975).

228. There are no indications to the contrary in the cases.

229. *See, e.g.*, cases cited *supra* note 227.

230. 429 U.S. 589 (1977); *see supra* note 164.

231. *Whalen*, 429 U.S. at 602-04. Justice Brennan added that "[b]road dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests." *Id.* at 606 (Brennan, J., concurring). Justice Stewart disagreed, emphasizing that there is no "general constitutional 'right to privacy.'" *Id.* at 607-08 (Stewart, J., concurring). For cases discussing the right to informational privacy with respect to medical records, see *United States v. Westinghouse*, 638 F.2d 570 (3d Cir. 1980); *General Motors Corp. v. Director of NIOSH*, 636 F.2d 163 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981); *Schachter v. Whalen*, 581 F.2d 35 (2d Cir. 1978). *See generally* Comment, *Public Health Protection and the Privacy of Medical Records*, 16 HARV. C.R.-C.L. L. REV. 265 (1981).

232. For example, a reasonable person might not object to the disclosure that he occasion-

rial that the ailment usually is not one that should arouse any emotion toward the victim save sympathy; most people simply do not want their ailments to be generally known."²³³

Although the *Whalen* Court did not expressly agree that drug use stigmatizes, it did not question the evidence that persons sometimes declined treatment because of fear that misuse of the government collected data could cause them to be labelled drug addicts.²³⁴ Accordingly, under these circumstances, a reasonable person could regard disclosure of his use of "controlled substances," by prescription or otherwise, as embarrassing and potentially harmful. A user of illegal drugs has an additional fifth amendment interest in not incriminating himself.²³⁵

The public interest in maintaining the confidentiality of drug users' identities depends upon whether purely legal issues are presented, to which the particulars of plaintiff's situation are irrelevant, and upon such factors as the ailments the drugs treat, the effects of the drugs, and the legality of the drug use. For example, the public interest in preserving the privacy of a cancer patient whose chemical treatments do not render him dangerous may be greater than that of keeping confidential the identities of those who suffer from grave contagious illnesses, whose drug use endangers others, or whose drug use is illegal.

Similarly, the degree to which it would be undesirable to force a plaintiff to choose between his lawsuit and his privacy interests varies. A case like *Whalen v. Roe*,²³⁶ for example, had substantial public utility. It would have been undesirable to force plaintiffs to surrender the very pri-

ally takes aspirin, while he might object to the disclosure that he is taking drugs for the treatment of cancer or venereal disease.

233. *Roe v. Ingraham*, 480 F.2d 102, 108 n.7 (2d Cir. 1973).

234. *Whalen*, 429 U.S. at 595 n.16. The Court commented that "disclosures of private medical information . . . are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient." *Id.* at 602.

Robinson v. California, 370 U.S. 660 (1962), illustrates the stigma attached to drug use. In *Robinson*, the Court struck down a statute that made it a crime for a person to have the "status" of being addicted to narcotics. Justice Douglas' concurrence criticized the attitude that addicts are people "who could, if they would, forsake their evil ways," or are people with a psychiatric disorder. *Id.* at 668-70, 672 (Douglas, J., concurring). In either event, he wrote that "[a] prosecution for addiction, with its resultant stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society." *Id.* at 677 (Douglas, J., concurring). As *Robinson* makes clear, in some instances the stigma attached to drug use resembles the stigma attached to criminal activities generally. Other cases recognizing the stigma attached to drug use include: *Coe v. Reynolds*, 529 F. Supp. 488, 489-90 (D.N.H. 1982); *Churchwell v. United States*, 414 F. Supp. 499, 503 (D.S.D. 1976), *aff'd*, 545 F.2d 59 (8th Cir. 1976); *Committee for G.I. Rights v. Callaway*, 370 F. Supp. 934, 938 (D.D.C. 1974), *rev'd on other grounds*, 518 F.2d 466 (D.C. Cir. 1975).

235. *But see infra* note 270.

236. 429 U.S. 589 (1977).

vacy and security interests they sought to protect in bringing litigation as the price of continuing to press their case. On the other hand, when the public interest in name disclosure is greater,²³⁷ it is less problematic to force a party to choose between his claim or defense and his privacy.²³⁸

Opposing the drug users' interests in privacy and security, there is the general public interest in disclosure of litigants' names, attenuated if pure legal issues are presented. Beyond that factor, the level of public interest varies. The public interest in disclosure is heightened when the drug user suffers from a grave contagious disease, uses drugs illegally, or endangers others. In these circumstances, members of the public have legitimate reasons to avoid the drug user in order to preserve their health, safety, and reputation.²³⁹ Occasionally there is an additional public interest in disclosure, arising from the public role of the party seeking a pseudonym. For example, in *Doe v. United States Department of Justice*,²⁴⁰ plaintiff, a state court judge, filed a Freedom of Information Act²⁴¹ ("FOIA") case without disclosing his true name. Plaintiff sought to discover the information and documents about him possessed by the Drug Enforcement Administration. Plaintiff argued that public revelation of his efforts to discover this information would embarrass him, prejudicially affect his privacy rights, and cast a "shroud of suspicion over his office," in contravention of his duty to promote public confidence in judicial integrity.²⁴² The court rejected this argument on the ground that "the public interest in the conduct of its business by public officials is of paramount importance."²⁴³

As with previous categories of cases, the need for party identification to the opposing litigant and the court will depend on the issues in the case. There is little need to know the plaintiff's identity to determine legal issues such as those raised in *Whalen v. Roe*, or in cases seeking declaratory and injunctive relief against federal and state criminal statutes prohibiting the private use and possession of marijuana by adults.²⁴⁴

237. See *supra* text accompanying note 235; *infra* text accompanying notes 240-43.

238. See, e.g., text accompanying notes 240-43.

239. On the other hand, the public interest may not be very strong even in these circumstances because of the possibility of exposure to unidentified others with the same illnesses or drug uses.

240. 93 F.R.D. 483 (D. Colo. 1982).

241. 5 U.S.C. § 552 (1982).

242. *United States Dep't of Justice*, 93 F.R.D. at 483-84.

243. *Id.* at 484. Additionally, public officials have a reduced expectation of privacy. See, e.g., *Nixon v. Administration of Gen. Serv.*, 433 U.S. 425, 458-65 (1977).

244. *Louisiana Affiliate of Nat'l Org. for Reform of Marijuana Laws v. Guste*, 380 F. Supp. 404 (E.D. La. 1974), *aff'd mem.*, 511 F.2d 1400 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975).

If factual matters peculiar to the party are in controversy, there is a greater need for disclosure. Parties seeking pseudonymity from the public often agree to disclose their true identities to the court, if not to their adversaries.²⁴⁵

Criminality and Unprofessional Conduct

There is a substantial group of cases in which persons suspected, or who feared they might be accused, of criminal activity or unprofessional conduct sought to sue or be sued pseudonymously. Usually, courts granted these requests. For example, in *Doe v. United States Civil Service Commission*²⁴⁶ the court permitted a finalist in the White House Fellowships competition to sue pseudonymously when she claimed that the agency violated her statutory and constitutional rights by recording and disseminating false derogatory statements about her, without affording her an opportunity to refute the allegations.²⁴⁷ The court merely noted that plaintiff had chosen to use a pseudonym to protect her identity, and that she had submitted her real name to the court in camera.²⁴⁸

Similarly, in *In re Doe*²⁴⁹ a psychiatrist appealed from a civil contempt order for failure to comply with a grand jury subpoena. The subpoena was issued in an investigation of a medical clinic that allegedly served as a front for the illegal sale of quaaludes. Without discussion, the court allowed the psychiatrist to sue as "Doe." In another case,²⁵⁰ an attorney sought review of a district court's refusal to quash a grand jury subpoena that sought work product. The grand jury was investigating allegations that the attorney had advised a client to lie and to bribe witnesses and had otherwise attempted to procure false testimony.²⁵¹ The court explained that it did not reveal the actual names of those involved in order to protect the secrecy of the continuing grand jury investigation

245. See, e.g., *United States Dep't of Justice*, 93 F.R.D. 483; *Louisiana Affiliate of Nat'l Org. for Reform of Marijuana Laws v. Guste*, 380 F. Supp. 404, 405 (E.D. La. 1974) (plaintiff planned to reveal his identity to the court in a sealed affidavit), *aff'd mem.*, 511 F.2d 1400 (5th Cir.), *cert. denied*, 423 U.S. 867 (1975); *Roe v. Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973) (court satisfied with plaintiffs' attorneys' representations that the fictitiously named plaintiffs were real and specific aggrieved individuals).

246. 483 F. Supp. 539 (S.D.N.Y. 1980).

247. *Id.* at 546, 548. The derogatory statements were that she had committed petty theft, had a propensity to steal, was schizophrenic, and was a kleptomaniac. *Id.* at 547.

248. *Id.* at 546 n.1; see also *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1095 (D.C. Cir. 1985) (Former Justice Department attorney who had been discharged amidst allegations of unprofessional conduct and dishonesty sued claiming, among other things, that her liberty interest in reputation was infringed without due process.).

249. 711 F.2d 1187 (2d Cir. 1983).

250. *In re Doe*, 662 F.2d 1073 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

251. *Id.* at 1076.

and to insulate the appellants from adverse publicity in the event that the grand jury did not return indictments.²⁵² Finally, one court permitted a corporation to sue as "John Doe Corporation" when appealing a civil contempt judgment for failure to produce certain documents and failure to make an employee available for grand jury testimony.²⁵³ Here, too, no indictments had yet been returned. To preserve secrecy, the court, in its opinion, referred to the corporation and the individuals involved by pseudonyms.²⁵⁴

In an additional group of cases, courts permitted attorneys and doctors to sue pseudonymously in actions to enjoin disciplinary proceedings, to challenge subpoenas, or to prevent disciplinary tribunals from relying upon grand jury materials.²⁵⁵ Most of these opinions contain little or no discussion of the reasons for allowing pseudonymity. In *Coe v. United States District Court*,²⁵⁶ however, the Tenth Circuit explained its reasoning on the pseudonymity issue. The appellate court held that the district court had not abused its discretion in refusing to allow Dr. Coe to file a section 1983²⁵⁷ action under a fictitious name or in sealed pleadings. Complaints alleging that Dr. Coe was guilty of professional misconduct had led to threatened formal disciplinary proceedings.²⁵⁸ Dr. Coe sued to restrain the state from conducting a public hearing, but the district

252. *Id.* at 1076 n.1; see also *In re Doe*, 551 F.2d 899, 900 n.1 (2d Cir. 1977) (On appeal from order holding attorney Doe in contempt for refusing to testify before a grand jury, the court indicated that "of necessity" his true name had to appear in any formal orders.).

253. *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982). The grand jury was investigating whether the corporation had paid money to a lawyer to enable him to bribe or attempt to bribe administration officials in a position to settle a controversy over its liability to a governmental body.

254. *Id.* at 483 n.1; see also *In re Grand Jury Subpoena Duces Tecum*, 725 F.2d 1110 (7th Cir. 1984) (corporation permitted to sue anonymously to challenge a grand jury subpoena duces tecum).

255. *E.g.*, *Doe v. Board of Professional Responsibility*, 717 F.2d 1424 (D.C. Cir. 1983) (attorney moved to quash subpoenas for financial records); *ACLU v. Bozardt*, 539 F.2d 340 (4th Cir.) (attorney Koe sought to block disciplinary proceedings as unconstitutional), *cert. denied*, 429 U.S. 1022 (1976); *Anonymous J. v. Bar Ass'n*, 515 F.2d 435 (2d Cir.) (attorney sought to enjoin use of grand jury testimony), *cert. denied*, 423 U.S. 840 (1975); *Anonymous v. Ass'n. of the N.Y. Bar*, 515 F.2d 427 (2d Cir.) (attorney sought to enjoin use of grand jury testimony), *cert. denied*, 423 U.S. 863 (1975); *Doe v. State Bar*, 415 F. Supp. 308, 309 n.1 (N.D. Cal.) (An attorney sought to enjoin disciplinary proceedings on constitutional grounds. The court looked with "great disfavor" upon "John Doe" pleadings, but noted that plaintiff had been allowed to maintain his anonymity in state court proceedings due to the possible adverse impact on his reputation.), *aff'd*, 582 F.2d 25 (9th Cir. 1976); *Doe v. Rosenberry*, 152 F. Supp. 403 (S.D.N.Y.) (attorney sought to enjoin use of grand jury testimony), *aff'd*, 255 F.2d 118 (2d Cir. 1957).

256. 676 F.2d 411 (10th Cir. 1982).

257. 42 U.S.C. § 1983 (1982).

258. *Coe*, 676 F.2d at 412.

court dismissed his pseudonymous complaint on the ground that the public interest in access, including the interests of Coe's present and potential patients, outweighed Coe's privacy interest.²⁵⁹ The Tenth Circuit agreed with the use of a balancing test and found no error in the district court's conclusion.²⁶⁰ The court also found that neither the state board's refusal to close its proceedings nor its offer to close the proceedings if Dr. Coe would suspend his medical practice pending the outcome of the proceedings, violated Coe's due process rights or constituted an abuse of discretion.²⁶¹

In some cases, courts have allowed pseudonyms in order to protect plaintiffs' fifth amendment rights not to incriminate themselves. In *Doe v. Miller*,²⁶² for example, parents sought to enjoin implementation of a state policy that forced them either to withdraw food stamp applications on behalf of their eligible citizen children or to disclose to federal authorities information about their own illegal alien status. To prevent the public disclosure of their true names and to protect their right not to incriminate themselves, the court allowed the action to proceed pseudonymously.²⁶³ Similarly, in *Minnesota Public Interest Research Group v. Selective Service System*²⁶⁴ male college students subject to the Military Selective Service Act,²⁶⁵ who needed to apply for federal financial aid in order to complete their education but who could not truthfully attest to compliance with the Act, challenged the constitutionality of a federal statute that linked the availability of student financial aid to draft registration. The court permitted them to sue pseudonymously, apparently to protect their fifth amendment rights because plaintiffs otherwise would have been forced to identify themselves as out of compliance with the

259. *Id.* at 414; *accord supra* text accompanying note 203.

260. *Coe*, 676 F.2d at 418.

261. *Id.* at 417. Notably, Dr. Coe argued that public disclosure of his true identity would destroy the very property and liberty interests he sought to protect by seeking an injunction against a public disciplinary hearing. *Id.* at 413. Such arguments are ordinarily forceful. *See supra* text accompanying note 147. This reasoning did not prevail here, however, at least in part because the federal courts recognized the state board's right to conduct public disciplinary proceedings.

262. 573 F. Supp. 461 (N.D. Ill. 1983).

263. *Doe v. Plyler*, 458 F. Supp. 569, 572 (E.D. Tex. 1978), *aff'd*, 457 U.S. 202 (1982), was a similar case. In *Plyler*, children of illegal aliens challenged their statutory exclusion from Texas schools. The court's protective order limited revelation of plaintiffs' names, but was not binding on United States immigration officials. *See also Doe v. Boyle*, 494 F.2d 1279 (4th Cir. 1974) (taxpayer allowed to sue pseudonymously in order to avoid an admission of failure to file timely returns).

264. 557 F. Supp. 923 (D. Minn. 1983); *see Doe v. Selective Serv. Sys.*, 557 F. Supp. 937 (D. Minn. 1983), *rev'd on other grounds*, 104 S. Ct. 3348 (1984); *Minnesota Pub. Interest Research Group v. Selective Serv. Sys.*, 557 F. Supp. 925 (D. Minn. 1983).

265. 50 U.S.C. §§ 451-471(a) (1982).

law.²⁶⁶

Applying the proposed analytic scheme to these cases, plaintiffs apparently met the first requirement of keeping their identities confidential as persons suspected, or fearing accusation, of criminal or unprofessional conduct. They sought continued secrecy in order to maintain good personal and professional reputations and to avoid stigma for violating criminal laws or professional ethical standards. Those whose pseudonymous lawsuits were brought to protect their good reputations were faced with a particular dilemma.²⁶⁷ Others, who feared accusation of illegal activities, also sought to avoid prosecution. All of these plaintiffs would reasonably regard public disclosure of their identities as embarrassing and harmful because of the likely adverse effects on their professional and personal lives.

Public interests often complemented the private interests in nondisclosure. For example, maintaining the secrecy and limiting the uses of grand jury testimony and materials serves several public policies, particularly protection of the innocent from disclosure of the fact that they were under investigation.²⁶⁸ In a number of the cases, the doctors and lawyers who sought pseudonymity had not yet been indicted, and the grand jury might have exonerated them. To have required them to identify themselves in related civil proceedings would conflict with the objectives of grand jury secrecy.²⁶⁹ Moreover, the fifth amendment adds a constitu-

266. With respect to the fifth amendment argument, see *Doe v. Selective Serv. Sys.*, 557 F. Supp. at 946-50.

267. See, e.g., *Doe v. United States Civil Serv. Comm'n*, 483 F. Supp. 539 (S.D.N.Y. 1980).

268. *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). Additional objectives are

“(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the [exonerated] innocent . . . from the expense of standing trial where there was no probability of guilt.”

1 W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* § 8.5, at 629 (1984) (quoting *Procter & Gamble*, 356 U.S. at 681-82 n.6 (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954))).

269. It also would have been inconsistent with the judicial doctrines governing the permissible scope of disclosure of grand jury matters to third parties. Normally, third parties may obtain federal grand jury materials only when the disclosure is preliminary to or in connection with a judicial proceeding. FED. R. CRIM. P. 6(e)(3)(C)(i). Such parties must show that the material they seek is needed to avoid possible injustice in another judicial proceeding, that disclosure outweighs the need for continuing secrecy, and that their request is narrowly drawn. *Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211 (1979). According to Professors LaFave

tional prohibition against forcing persons to incriminate themselves through their own mouths.²⁷⁰ Requiring such plaintiffs to sue in their true names would create the risk of prosecution based on self-incrimination, and alternatively, would inhibit the pursuit of important statutory challenges.

On the other hand, there is the strong public interest in access to litigant identity. Although there is also a public interest in knowing the names of persons who might be guilty of unprofessional or illegal conduct, this public interest does not outweigh an individual's privacy and security interests until he has been formally charged with wrongdoing.²⁷¹ As the cases described above suggest, plaintiffs suspected or fearing accusation of criminal activity or unprofessional conduct often are able to establish "substantial cause" to sue or be sued pseudonymously.

When one turns to secrecy from the adversary and the court, one finds that, in several instances, the defendant already knew the plaintiff's identity and the plaintiff did not resist disclosure to the court.²⁷² By contrast, in certain actions challenging governmental policies and statutes, when plaintiffs invoked the fifth amendment in support of their requests for pseudonymity,²⁷³ neither the defendants nor the courts had strong reason to know plaintiffs' identities because pure legal questions were presented and the particular plaintiffs were fungible with similarly situated individuals.²⁷⁴ Plaintiffs successfully resisted disclosure to the defendant; it is unclear from the opinions whether they resisted disclosure

and Israel, the need for secrecy is greatest when the grand jury is still considering whether to indict. On the other hand, when an "administrative proceeding requires a judicial determination for enforcement, as in attorney disbarment, disclosure to assist the agency in the proceeding ordinarily would be within the Rule. Even then, however, . . . disclosure could not yet be viewed as preliminary to a judicial proceeding." W. LAFAYE & J. ISRAEL, *supra* note 268, at 640-41 (footnotes omitted).

270. C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE—CRIMINAL* § 407 (2d ed. 1982) (The privilege of the accused not to be compelled to be a witness against himself reaches an accused's communications.).

The privilege is also available to witnesses whose responses would support a conviction for a past crime or would furnish a link in the chain of evidence needed to prosecute. *Id.* § 447. A denial of pseudonymity, however, does not necessarily force plaintiffs to incriminate themselves, because they are free to drop their lawsuits. *See Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 104 S. Ct. 3348, 3358 (1984) (A statute compelling non-registrants with the Selective Service to acknowledge their failure to register when applying for financial aid did not violate their fifth amendment rights because the non-registrants were under no compulsion to seek financial aid.).

271. *See, e.g., Coe*, 676 F.2d 411; *supra* notes 255-61 & accompanying text; *see supra* text accompanying notes 268-69.

272. *See, e.g., supra* text accompanying notes 246-63.

273. *See supra* text accompanying notes 264-66.

274. *See supra* text accompanying note 197.

to the court.²⁷⁵

Juveniles

A sixth category of cases in which parties have sought pseudonymity involves juveniles, including delinquent, neglected, abused, or illegitimate children. In this group of cases, the pseudonymous party was usually a defendant rather than a plaintiff.

Some of the federal court cases involve juveniles embroiled in the juvenile justice system. The cases were in federal court pursuant to the Federal Juvenile Delinquency Act,²⁷⁶ the Federal Youth Corrections Act,²⁷⁷ or because they raised federal constitutional or statutory claims.²⁷⁸ These cases are in many respects essentially criminal,²⁷⁹ and commentators have argued that the reasons for open criminal trials are applicable equally to juvenile delinquency hearings.²⁸⁰

275. See *supra* text accompanying notes 264-66.

276. Pub. L. No. 93-415, 88 Stat. 1138 (1974) (codified at 18 U.S.C. §§ 5031-5042 (1982), amended by Pub. L. No. 98-473, 98 Stat. 2013, 2031 (effective Nov. 1, 1986). This is the main statutory embodiment of federal juvenile delinquency policy.

277. Pub. L. No. 94-233, 90 Stat. 231, 232 (1976) (formerly codified at 18 U.S.C. §§ 5005-5026), repealed by Pub. L. No. 98-473, 98 Stat. 2027 (1984).

278. E.g., *Roe v. New York*, 49 F.R.D. 279 (S.D.N.Y.) (1970) (action under 42 U.S.C. § 1983 (1982) alleging inadequate rehabilitative treatment); see also *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985) (appeal from adjudication of delinquency); *United States v. Doe*, 627 F.2d 181 (7th Cir. 1980); *United States v. Indian Boy X*, 565 F.2d 585 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978).

279. *Breed v. Jones*, 421 U.S. 519, 531 (1975) (Juvenile proceedings are essentially criminal for purposes of the double jeopardy prohibition.); see *In re Winship*, 397 U.S. 358, 365 (1970) (Due process guarantees juveniles the right to proof beyond a reasonable doubt.); *In re Gault*, 387 U.S. 1, 35-57 (1967) (Due process guarantees juveniles the rights to notice of charges, to counsel, to confront and cross-examine witnesses, and to avoid self-incrimination.). But see *McKiever v. Pennsylvania*, 403 U.S. 528, 543-47 (1971) (Due process does not require sixth amendment right to jury trial at delinquency adjudication hearings.).

280. Note, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment*, 17 COLUM. J.L. & SOC. PROBS. 287, 333-39 (1982); Comment, *The Right of Access and Juvenile Delinquency Hearings: The Future of Confidentiality*, 16 IND. L. REV. 911, 913, 935-40 (1983); see Note, *supra*, at 344 n.402 (citation of additional publications advocating variations of press access to juvenile proceedings for "no-names" reporting).

One commentator has explained:

Publicity is said to give the juvenile respondent a self-image of criminality and to stigmatize him, thus causing him to commit more delinquent acts. In addition, adverse publicity may create future disabilities for a juvenile by limiting employment and educational opportunities . . . [E]xposure to adverse publicity is seen as a form of punishment. Moreover, advocates of closed proceedings claim that it is cruel and counterproductive to punish the parents of delinquents by publishing the child's misbehavior. Finally, it is alleged that some delinquents want attention and recognition; therefore, publicity may reward or contribute to delinquent behavior.

The first flaw in these arguments is that rehabilitation is no longer the sole goal; . . . an equally compelling goal is protecting the public and preventing juvenile

Many writers who favor some form of press access to delinquency hearings, however, also favor maintaining the confidentiality of accused juveniles' names.²⁸¹ Both society and the juvenile possess the same interests in confidentiality: to avoid stigmatizing the youth and to foster his rehabilitation.²⁸² The interests favoring disclosure of the juvenile of-

crime, which may be furthered by the deterrent effect that publicity would have. Moreover, . . . confidentiality and rehabilitation are only impaired by the publication of the identity of the juvenile respondent, not by mere access alone. Juvenile court confidentiality involves two concepts, access and publication. Only the latter directly affects rehabilitation . . .

Moreover, the Supreme Court's decisions in *Oklahoma Publishing Co. v. District Court*, and *Smith v. Daily Mail Publishing Co.*, . . . favor . . . the public's right to know the juvenile offender's name Therefore, excluding the press and the general public from juvenile court hearings is likely to be ineffective in protecting the identity of juveniles . . . because the press is likely to learn of the juvenile respondent's identity through lawful means, such as interviewing witnesses at the scene of the incident.

Comment, *supra* at 938-39 (footnotes omitted). The commentator concludes that the constitutional right of access should be extended to include juvenile delinquency hearings. *Id.* at 940.

281. See Note, *supra* note 280, at 344 n.402.

282. Congress, like most state legislatures, has sought to treat and to rehabilitate juveniles. Both the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1982), and the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1982), are aimed at rehabilitation rather than punishment. For discussion of the underlying congressional policy of rehabilitation, see, e.g., *Doe v. Webster*, 606 F.2d 1226, 1234-36 (D.C. Cir. 1979); *Ha Yau-Leung v. Soscia*, 500 F. Supp. 1382, 1386-89 (E.D.N.Y. 1980), *rev'd on other grounds*, 649 F.2d 914 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981). To that end, Congress has built extensive mechanisms for preserving confidentiality into the procedures governing federal juvenile delinquency hearings. 18 U.S.C. § 5038 (1982). The courts are required to seal the entire file and record when a delinquency proceeding has been completed and may release the records only to statutorily specified persons on specified occasions. *Id.* § 5038(a). During the course of the proceeding, the records are similarly guarded. *Id.* § 5038(c). Unless otherwise authorized, information about the record may not be released when the request is related to an application for employment, license, bonding, or any civil right or privilege. *Id.* § 5038(a). Specifically, with respect to publication of the youth's name, the statute provides that unless the juvenile is prosecuted as an adult, "neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding." *Id.* § 5038(d)(2). Section 5038(d)(1) proscribes the taking of the juvenile's fingerprints or photograph without the written consent of the judge. *Id.* § 5038(d)(1). Subsection (d) was upheld against a constitutional challenge in *Oklahoma Publishing Co. v. United States*, 515 F. Supp. 1255 (D. Okla. 1981).

Although the foregoing provisions reflect a strong spirit of confidentiality, none addresses the specific question of whether in juvenile delinquency and related proceedings, or in published court opinions, the juvenile should be referred to by a pseudonym. Several courts have allowed the use of pseudonyms or initials in these cases, sometimes citing 18 U.S.C. § 5038 (1982). E.g., *United States v. B.N.S.*, 557 F. Supp. 351 n.* (D. Wyo. 1983) (ruling against motion to transfer juvenile to adult status); *United States v. E.K.*, 471 F. Supp. 924, 924 n.* (D. Or. 1979) (ruling against motion to transfer juvenile to adult status); *United States v. Doe*, 385 F. Supp. 902, 903 (D. Ariz. 1974) (defendant's identity withheld because these were juvenile proceedings). Generally, however, there is no explanation. See, e.g., *United States v. Doe*, 701 F.2d 819 (9th Cir. 1983) (affirming adjudication of juvenile delinquency); *United States v.*

fender's name, however, are weaker than the general interests in access to the proceedings. Even if the juvenile's name is kept out of the proceedings, many of the functions of access can be substantially served.²⁸³ Thus, the balance shifts toward maintaining the confidentiality of names.²⁸⁴ Consistent with this view, Justice Rehnquist has written:

This insistence on confidentiality is born of a tender concern for the welfare of the child The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public This exposure brings undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities or provide the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further antisocial acts Such publicity also renders nugatory States' expungement laws, for a potential employer or any other person can retrieve the information the States seek to "bury" simply by visiting the morgue of the local newspaper. The resultant widespread dissemination of a juvenile offender's name, therefore, may defeat the beneficent and rehabilitative purposes of a State's juvenile court system.

By contrast, a prohibition against publication of the names of youthful offenders represents only a minimal interference with freedom of the press The press is free to describe the details of the offense and inform the community of the proceedings against the juvenile. It is difficult to understand how publication of the youth's name is in any way necessary to performance of the press' "watchdog" role. In

Doe, 642 F.2d 1206 (10th Cir.) (affirming adjudication of juvenile delinquency), *cert. denied*, 454 U.S. 817 (1981); United States v. Doe, 631 F.2d 110 (9th Cir.) (affirming adjudication of juvenile delinquency but reversing the sentence), *cert. denied*, 449 U.S. 867 (1980); United States v. J.D., 525 F. Supp. 107, 110 (S.D.N.Y. 1981) (transferring juvenile to adult status; same practice as to names); United States v. J.D., 525 F. Supp. 101, 104, 107 (S.D.N.Y. 1981) (Statute outlining prerequisites for federal jurisdiction over juvenile defendants and procedure for transfer of juvenile to adult status was not void for vagueness and did not violate the sixth amendment right to counsel; on consent of all attorneys, the opinion was submitted for publication with the defendants' names withheld.); Doe v. United States, 520 F. Supp. 1200, 1202-03 (S.D.N.Y. 1981) (Plaintiff had cause of action under Federal Tort Claims Act when probation department's negligent failure to inform FBI of setting aside of his conviction under Federal Youth Corrections Act caused him to lose his job.).

In several cases in which youthful offenders sued for expungement of their convictions, which had been set aside, the courts on their own motion substituted a pseudonym for plaintiff's true name in the reported opinions. *See, e.g.,* Doe v. Webster, 606 F.2d 1226 (D.C. Cir. 1979); United States v. Doe, 579 F. Supp. 1351, 1351 n.1 (N.D. Ill. 1984); United States v. Doe, 496 F. Supp. 650 (D.R.I. 1980). To do otherwise would invite the very stigma expungement seeks to prevent.

283. *See supra* text accompanying note 92.

284. *See, e.g.,* Note, *supra* note 280, at 330, 344.

those rare instances where the press believes it is necessary to publish the juvenile's name, the West Virginia law, like the statutes of other States, permits the juvenile court judge to allow publication. The juvenile court judge, unlike the press, is capable of determining whether publishing the name of the particular young person will have a deleterious effect on his chances for rehabilitation and adjustment to society's norms.²⁸⁵

That analysis fails to address other important public interests. As one commentator has noted:

If attempts at rehabilitation are as fruitless as many suggest, it may no longer be sensible to argue that publicizing the identities of juveniles should be prohibited because it interferes with attempts to rehabilitate the child As the crime gets more serious and the number of juvenile court appearances by the juvenile increases, public interest in the case and [in] the juvenile is likely to increase In addition, the juvenile court may feel that publicity will be a deterrent to recidivism or at least not harm any rehabilitative possibilities, if they exist. The juvenile court should have the discretion to release the name of the juvenile if the situation is sufficiently compelling.²⁸⁶

In view of these questions concerning the linkage between confidentiality of judicial proceedings and rehabilitation,²⁸⁷ the courts should employ a sensitive balancing test in this context.

Juvenile delinquency cases should be determined on a case by case basis in the federal courts. The courts should first consider the extent to which the accused offender has been identified publicly, because the greater the previous identification, the weaker the interest in pseudonymity. Next, the court should consider the strength of the interest in preserving the secrecy of the juvenile's identity. This determination would turn on an appraisal of the youth's chances for rehabilitation,²⁸⁸ and the likelihood that use of the juvenile's name would harm his chances for rehabilitation.

The strong public interest in disclosure appropriate to proceedings of this nature, which are neither truly criminal nor civil, must be weighed against the interest in pseudonymity. The public's interest in knowing

285. *Smith v. Daily Mail Publishing Co*, 443 U.S. 97, 107-09 (1979) (Rehnquist, J., concurring) (footnotes omitted).

286. Note, *supra* note 280, at 289, 317; *see id.* at 345.

287. *See supra* text accompanying note 286.

288. In this regard, many of the factors federal courts consider when assessing a transfer to the conventional criminal system would be relevant. These factors include the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

18 U.S.C. § 5032 (1982).

the juvenile's name might increase with such factors as the nature of the alleged offense and the nature and extent of the juvenile's prior delinquency record, because these indicate the degree to which the juvenile is dangerous. Therefore, particularly in these cases, whether there is "substantial cause" for pseudonymity is a very individual determination.²⁸⁹

Other pseudonymous suits in federal court arise out of governmental involvement with abused, neglected, or illegitimate children, or simply because minors are subject to special disabling legislation.²⁹⁰ Only some published opinions in this area explain the use of pseudonyms. In *Moe v. Dinkins*,²⁹¹ for example, the court permitted an un-

289. This position is consistent with the Supreme Court's opinion in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-11 (1982), that safeguarding the physical and psychological well being of a minor is a compelling interest, but must be determined case by case. In these cases there is no question of pseudonymity vis-a-vis the executive branch of the government, or the court; each must know the juvenile's identity in order to prosecute and decide the case.

In *Roe v. New York*, 49 F.R.D. 279 (S.D.N.Y. 1970), plaintiffs who sued under the Constitution and 42 U.S.C. § 1983 (1982) and argued that they were not receiving adequate rehabilitative treatment, were not allowed to sue pseudonymously. *Roe*, 49 F.R.D. at 280-82. Plaintiffs argued that publicizing their commitment to state facilities would subject them to embarrassment, harassment, and ridicule, and that it would hamper their assimilation into the community. *Id.* at 280. The court, citing only factually different cases, found these reasons insufficient. *Id.* at 281-82. Although the court was persuaded that "sound public policy would appear to require that a complaint identify by true name at least one of the plaintiffs if the filing is to commence an action," it generally seemed to be quibbling with the particular procedure plaintiffs had chosen. *Id.* at 282. The court stated that "[i]f an action had been commenced . . . , then amendments could be permitted or protective orders made, on a proper showing, which would shield the identity of plaintiffs from the public while permitting this necessary knowledge to the Court and to the defendants." *Id.* at 281. In fact, given the nature of the allegations, the plaintiffs' names probably were needed for an adequate defense, res judicata, and other judicial purposes.

290. *E.g.*, *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983) (class action challenging welfare department policies permitting certain children to be removed from their natural parents' physical custody without prior written notice or an opportunity for a hearing; no discussion of the pseudonym); *Doe v. New York Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981) (Foster child sued agency for failure to adequately supervise placement.); *Candy H. v. Redemption Ranch*, 563 F. Supp. 505, 508 (M.D. Ala. 1983) (Plaintiffs, pregnant girls who alleged that they were induced to enter defendant's home for girls, brought a civil rights action alleging corporal abuse and violation of their right to travel; in support of using partial names, the court cited *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981), discussed *infra* notes 342-52 & accompanying text.); *Smith v. Grossmann*, No. C-1-81-547 (S.D. Ohio April 26, 1982) (child, taken into the government's custody based upon probable cause that he was in immediate danger from his surroundings, claimed deprivation of liberty without due process and unconstitutional application of Ohio juvenile rules of procedure; no explanation of pseudonyms but court noted that records reflecting the true names had been sealed and preserved for appellate review); *Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976) (class action alleging denial of a fundamental constitutional right to be placed in a permanent home rather than in foster homes; no explanation of pseudonyms).

291. 533 F. Supp. 623 (S.D.N.Y. 1981) (Plaintiffs, a mother and her intended husband who sought to remove the stigma of illegitimacy from their son, challenged constitutionality of

married young couple expecting a child to sue pseudonymously because the case concerned matters of a "highly sensitive and personal nature such as marriage and illegitimacy."²⁹² Their complaint satisfied the court that plaintiffs had standing to sue because they had submitted sealed affidavits, signed in their true names, attesting to the accuracy of their allegations, and their attorney, by affidavit, had stated that plaintiffs were real people.²⁹³

In *Roe v. Borup*,²⁹⁴ a child and its parents brought a section 1983²⁹⁵ civil rights suit against the state department of social services for removing the child from her parents' custody for several weeks, alleging sexual abuse. The court permitted plaintiffs to sue pseudonymously because an important privacy interest was present and because plaintiffs sought to be shielded from additional psychological harm. Plaintiffs had alleged that they would be subjected to harassment and embarrassment if the serious allegations involved here were revealed.²⁹⁶ The court rejected as unsupported defendants' argument that a damages claim should preclude the use of fictitious names,²⁹⁷ and it refused to adopt a "highly mechanical" interpretation of the Federal Rules of Civil Procedure, which would necessarily require the dismissal of the complaint.²⁹⁸

As with other categories of cases, the courts should balance the interests involved in deciding whether to permit such plaintiffs to proceed pseudonymously. Assuming plaintiffs have kept their identities confidential, the next question is the substantiality of the reasons for seeking anonymity. Despite its irrationality,²⁹⁹ society has stigmatized illegitimate children.³⁰⁰ Although illegitimacy may be more socially acceptable today

a statute prohibiting marriage by a woman under 18 without parental permission.), *on remand from* 635 F.2d 1045, 1047 n.1 (2d Cir. 1980) (allowing original plaintiffs to sue pseudonymously), *aff'd*, 669 F.2d 67 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982).

292. *Id.* at 625-27.

293. *Id.* at 627.

294. 500 F. Supp. 127 (E.D. Wis. 1980).

295. 42 U.S.C. § 1983 (1982).

296. *Borup*, 500 F. Supp. at 129-30. The court also noted that, because a juvenile was involved, state law required the records of the underlying action, which temporarily had removed the child from her parents' custody, to be kept confidential. *Id.* at 129.

297. *Id.* at 129-30.

298. Defendants argued that the court lacked subject matter jurisdiction over the case and personal jurisdiction over the parties because plaintiffs' true names were not used in the complaint, and that the absence of true names on the summonses rendered them insufficient under Federal Rule of Civil Procedure 4(b). *Id.* at 128-29.

299. In *Levy v. Louisiana*, 391 U.S. 68, 72 n.6 (1968), the Court injected: "We can say with Shakespeare: 'Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? why brand they us with base? with baseness? bastardy? base, base?' King Lear, Act I, Scene 2."

300. See, e.g., *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (plurality opinion) (referring to

than it once was,³⁰¹ the illegitimate child still risks ridicule, harassment, and ostracism. In addition, illegitimate children have a privacy interest in the circumstances of their birth that is impaired if they must reveal this status.³⁰² Hence, their interests in privacy and security are substantial, and the societal interest in the well-being of these youngsters supports the withholding of their names. Moreover, plaintiffs in these actions typically alleged violations of their civil rights. It would not serve the public interest for such suits to escape adjudication on the merits because of a requirement that plaintiffs disclose their identities.

While there is, on the other hand, the usual public interest in knowing the litigants' identity, there is no extraordinary public interest in knowing who is illegitimate. A desire for identifying information for the purpose of harassing an illegitimate child is obviously unworthy of regard, and assistance can be afforded without indiscriminate publicity. Hence, the balance ordinarily favors pseudonymity. The parents' identities could not be disclosed without identifying the child. Accordingly, parents should be allowed to proceed pseudonymously for the benefit of an illegitimate child.

Abused or neglected children may suffer less stigma than those identified as illegitimate, but they have at least as strong a privacy interest in keeping that information confidential. Their desire to sue under a pseudonym similarly should be respected unless the public interest in disclosure outweighs the litigants' privacy interests. The societal interest in the well-being of these youngsters supports the withholding of their names. Moreover, plaintiffs in these actions typically alleged violations of their civil rights. It would not serve the public interest for such suits to escape adjudication on the merits because of a requirement that plaintiffs disclose their identities. There are public and governmental interests in identifying abusive and neglectful parents so that they can be educated, helped, or, in some instances, punished. Insofar as this interest is primar-

the stigma of bastardy); *accord* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175-76 (1972).

301. Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 715 (1976). The Supreme Court has struck down legislative classifications based on illegitimacy as violating the equal protection clause of the fourteenth amendment. *E.g.*, Trimble v. Gordon, 430 U.S. 762, 763-66, 769-73, 776 (1977) (striking down provision of Illinois Probate Act that allowed illegitimate children to inherit by intestate succession only from their mothers); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 165 (1972) (striking down provision of Louisiana workmen's compensation statute that allowed unacknowledged illegitimate children to recover only in limited circumstances). *But see* Labine v. Vincent, 401 U.S. 532 (1971) (upholding statute adversely affecting some illegitimate children).

302. Moe v. Dinkins, 533 F. Supp. 623, 627 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982).

ily governmental and not public, however, the identities need not be disclosed to the general public. To the extent that there is a legitimate public interest, it is in helping rather than in punishing. With or without the urging of the court or other governmental agencies, however, an abusive or neglectful parent, or an abused or neglected child, can obtain help from the private sphere without disclosing the identity of the abused or neglected child to the public at large. Consequently, the child's interest in privacy outweighs the public interest in knowing his identity, either for its own sake or for the sake of identifying his parents. Pseudonymity ordinarily should be permitted with respect to the public. The nature of the case will sometimes require the defendants and the court to know plaintiffs' identities, depending on whether it raises factual issues peculiar to the plaintiffs or, at the other extreme, purely legal questions.³⁰³

Public Aid

In several cases, recipients of public aid have sought pseudonymity.³⁰⁴ These litigants usually have been successful in their efforts to conceal their identities. In *Campbell v. United States Department of Agriculture*,³⁰⁵ for example, plaintiffs sued to compel promulgation of regulations that would allow eligible social security income ("SSI") applicants and recipients to apply for food stamps at their social security offices.³⁰⁶ The two individual plaintiffs, one of whom sued as Jane Doe, alleged that they were SSI recipients eligible for food stamps, but could not participate in the program because of their disabilities. Their problems would have been obviated if food stamp applications could

303. See *supra* note 290. Compare *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983) (a largely legal case), *cert. denied*, 104 S. Ct. 1301 (1984) with *Candy H. v. Redemption Ranch*, 563 F. Supp. 505 (M.D. Ala. 1983) (a highly factual case).

304. There are cases in which persons who were permitted to sue pseudonymously had more than one reason for seeking anonymity. See, e.g., *Doe v. Mathews*, 420 F. Supp. 865 (D.N.J. 1976) (challenging law precluding use of appropriations to pay for abortions except when necessary to avoid endangering the life of the mother); *Doe v. Flowers*, 364 F. Supp. 953 (N.D. W. Va. 1973) (class action challenging state welfare regulation requiring unwed mothers to help identify putative fathers), *aff'd*, 416 U.S. 922 (1974); *Doe v. Norton*, 356 F. Supp. 202, 203 n.1 (D. Conn.) (same; in permitting pseudonyms, court emphasized that plaintiffs, mothers of illegitimate children, sued on behalf of their minor children), *modified*, 365 F. Supp. 65, 68 n.1 (D. Conn. 1973), *vacated on other grounds sub nom. Maher v. Doe*, 422 U.S. 391 (1975); *Doe v. Lavine*, 347 F. Supp. 357, 358 (S.D.N.Y. 1972) (same); *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill.) (same), *aff'd sub nom. Weaver v. Doe*, 404 U.S. 987 (1971); *Doe v. Kurtis*, 306 F. Supp. 509 (S.D.N.Y. 1969) (same); *Doe v. Shapiro*, 302 F. Supp. 761, 762 n.2 (D. Conn. 1969) (same), *appeal dismissed*, 396 U.S. 488 (1970).

305. 515 F. Supp. 1239 (D.D.C. 1981).

306. *Id.* at 1241.

have been processed at their local social security offices.³⁰⁷ The court allowed Doe to sue pseudonymously, keeping her identity from both the public and the defendant, in order “to protect sensitive personal information and to shield her from feared abuse and harassment from her neighbors, the media, and the public.”³⁰⁸ Although the court was willing to make plaintiff’s true name and address available to defendants upon a showing of necessity, it found that they could not make that showing in this case.³⁰⁹ The court thus rejected defendants’ argument that their right to know the plaintiff’s identity should not be conditioned upon a showing of necessity.³¹⁰

The *Campbell* court did not address the public interest in plaintiff Doe’s identity.³¹¹ Although the universal minimum of public interest is present, no extraordinary interest appears to exist. Although the public, which is taxed for social security and food stamp programs, certainly has an interest in the programs’ implementation, it does not have an overriding interest in knowing which individuals are most inconvenienced by the inability to get food stamps at a social security office. Although the public interest in access was unexceptional, the court did not explain why Doe’s argument for pseudonymity was persuasive. What was the “sensitive personal information” sought to be shielded and was there reason to fear that its disclosure would cause plaintiff to suffer abuse and harassment? If the sensitive and personal information was that plaintiff had

307. *Id.*

308. *Id.* at 1245.

309. *Id.* at 1245-46.

310. *Id.* at 1245. Defendants argued that “the concealment of plaintiff’s true identity deprives them of their rights to know against whom they are litigating, to determine whether the anonymous allegations are based on fact, to gather contrary evidence, and to determine who is precluded from relitigating issues decided in their favor.” *Id.* The court responded that the issues in the case were legal issues, turning upon an interpretation of the Food Stamp Act of 1977, Pub. L. No. 99-113, 91 Stat. 979 (codified at 7 U.S.C. §§ 2011-2029 (1982)), and consequently, the only need defendants could have for information about Jane Doe would be to challenge her standing to sue. The court held, however, that because organizational plaintiffs had standing, and the declaratory and injunctive relief they sought would identically affect all Social Security Income recipients eligible for food stamps, it was inconsequential whether Doe also had standing. *Campbell*, 515 F. Supp. at 1246. Under these circumstances, defendants failed to show any necessity for learning Doe’s identity.

311. The court arguably should have considered this question first, because if the public interest in disclosure outweighs the litigant’s interests in confidentiality, the question of secrecy from the opposing litigant is moot. Only if a litigant’s identity is to be kept from the public does the question of secrecy from the adversary arise. On the other hand, the adversary will always have a greater interest than the public in knowing the “pseudonymous” party’s identity. Therefore, if the adversary’s interest in disclosure is inadequate, a fortiori the public’s interest in disclosure is outweighed. This supports the court’s decision to consider the adversary’s interest first.

health problems and disabilities that impeded her access to food stamps, this privacy interest in health is not absolute.³¹² If the information involved plaintiff's receipt of social security income or eligibility for food stamps, the privacy interest in financial condition also is not absolute.³¹³ Neither health problems nor financial need necessarily subjects one to abuse and harassment. Finally, if the sensitive and personal information was that plaintiff was bringing this lawsuit, there is nothing in the opinion that substantiates that such conduct would subject her to harassment or abuse, nor would she have any recognized privacy interest. Plaintiff's privacy or security interests might have outweighed any public interest in knowing her identity, but the *Campbell* court did not shed much light on these issues.³¹⁴

Other cases challenge certain eligibility requirements in state welfare regulations, such as the cooperation of aid recipients, usually mothers, in obtaining support from legally responsible persons, usually fathers.³¹⁵ The opinions do not explain the reasons for allowing the use of pseudonyms. One can infer that the supporting interests are privacy interests in either financial condition or the spouse's failure to fulfill his moral and legal support obligations. Pseudonymity might save the custodial parent and the children from embarrassment, ridicule, or stigma. The courts have not explicitly weighed these interests against the general public interest in knowing the litigants' identities. As with other challenges to statutes governing the use of public funds, the public has a particular interest in litigation that affects public expenditures because taxpayers ultimately foot the bill. The public does not, however, have a strong interest in knowing precisely who seeks public aid or who challenges particular eligibility requirements. Any individual recipient has a very small

312. See *Whalen v. Roe*, 429 U.S. 589 (1977).

313. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 64-84 (1976) (act requiring disclosure of political campaign contributions upheld against claims that first amendment rights of minor parties and independent candidates could be infringed); *Du Plantier v. United States*, 606 F.2d 654 (5th Cir. 1979) (act requiring federal judges to report their personal finances not violation of right to confidentiality because public interest in impartial judiciary outweighed infringement on privacy), *cert. denied*, 449 U.S. 1076 (1980); *Plante v. Gonzales*, 575 F.2d 1119 (5th Cir. 1978) (act requiring state senators to disclose financial information not violation of right to privacy, which was outweighed by the public interests in discouraging corruption, bolstering confidence in government, and aiding prosecutions), *cert. denied*, 439 U.S. 1129 (1979).

314. Unlike in *Campbell*, the court in *Male v. Crossroads Assocs.*, 320 F. Supp. 141 (S.D.N.Y. 1970), did not allow the plaintiffs, welfare recipients, to sue pseudonymously. *Id.* at 143.

315. E.g., *Doe v. Carleson*, 356 F. Supp. 753 (N.D. Cal. 1973); *Doe v. Gillman*, 347 F. Supp. 483 (N.D. Iowa 1972); see also *Doe v. Schmidt*, 330 F. Supp. 159 (E.D. Wis. 1971) (challenging miscellaneous eligibility requirements); *Doe v. Hursh*, 337 F. Supp. 614 (D. Minn. 1970) (challenging 90-day waiting period from father's absence).

impact on total public aid expenditures, while identifying information easily could be put to abusive purposes. In these cases, the courts will have to examine the evidence and the arguments closely as to the privacy and security interests at stake to determine whether they outweigh the general public interest in knowing who is litigating.

Fears of Physical, Economic, or Professional Reprisal

Fear of Reputation as a Troublemaker

There are some cases in which plaintiffs sought to sue pseudonymously because they feared reprisal from certain powerful institutions that might brand them as troublemakers or traitors. Examples include prison inmates' challenges to conditions of their confinement, and employment discrimination suits.³¹⁶ In *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*,³¹⁷ a Southern Methodist University ("SMU") women's law association sued two Dallas law firms, alleging sex discrimination in the hiring of summer law clerks and regular associates.³¹⁸ Four female lawyers sought to be added as pseudonymous plaintiffs ("Lawyers A-D"). They were willing to disclose their identities to defense counsel provided that counsel would be prevented from disseminating the information.³¹⁹ The trial court refused to allow the pseudonymity.³²⁰

On appeal, plaintiffs argued that disclosure of the four lawyers' identities would "leave them vulnerable to retaliation from their current employers, prospective future employers and an organized bar that does 'not like lawyers who sue lawyers.'" ³²¹ In particular, they argued that disclosure would cause them economic and social harm, that they would be "eased out" or "assigned less desirable matters" by their employers, and

316. *E.g.*, *Doe v. District of Columbia*, 697 F.2d 1115, 1120-21 (D.C. Cir. 1983) (inmates in class action against District of Columbia contended that a protective order forbidding defense counsel to disclose to defendants certain information obtained during discovery necessary to prevent risk of violent reprisal; appellate court vacated district court's protective order because alternative methods available to prevent retaliation); *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980) (inmate who had served as a government witness and faced a risk of serious bodily harm if that was disclosed to other inmates permitted to sue pseudonymously); *Glover v. Johnson*, 85 F.R.D. 1, 2 n.1 (E.D. Mich. 1977) (inmates, alleging fear of retaliation if their participation in the suit became known to defendants, permitted to sue pseudonymously).

317. 599 F.2d 707 (5th Cir. 1979).

318. *Id.* at 708-10.

319. *Id.* at 710.

320. The court reasoned that the lawyers were in danger of economic and social harm, rather than physical harm, and that "the mechanics of non-disclosure would further complicate" the cases. *Id.*

321. *Id.* at 713.

that their firms might lose business.³²² If disclosure did have such adverse effects, plaintiffs argued that other professionals would become reluctant to sue for alleged discrimination.³²³

The Fifth Circuit first noted that neither the Federal Rules of Civil Procedure nor Title VII³²⁴ provides for anonymous plaintiffs as an exception to the general principle that “ ‘the identity of the parties to a lawsuit should not be concealed.’ ”³²⁵ The court found that the cases allowing pseudonymity shared several characteristics missing here:

The plaintiffs in those actions, at the least, divulged personal information of the utmost intimacy; many also had to admit that they either had violated state laws or government regulations or wished to engage in prohibited conduct. Here, by contrast, to prove their case A-D need not reveal facts of a highly personal nature or express a desire to participate in proscribed activities. Furthermore, all of the plaintiffs previously allowed . . . to proceed anonymously were challenging the constitutional, statutory or regulatory validity of government activity. While such suits involve no injury to the Government’s “reputation,” the mere filing of a civil action against other private parties may cause damage to their good names and reputation and may also result in economic harm. Defendant law firms stand publicly accused of serious violations of federal law. Basic fairness dictates that those among the defendants’ accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names.³²⁶

In addition, the court noted that other women had filed sex discrimination suits against large law firms in their real names, and Lawyers A-D faced no greater threat of retaliation than had those others.³²⁷ The court concluded that because there was “neither an express congressional grant of the right to proceed anonymously nor a compelling need to ‘protect[] privacy in a very private matter,’ ”³²⁸ plaintiffs would not be permitted to sue under fictitious names.³²⁹

322. *Id.* at 711.

323. *Id.* Plaintiffs also were concerned about an invasion of privacy: if their names were revealed to the public, their law school grades and class ranks would be “bandied” about in public. Brief for Appellants at 9.

324. 42 U.S.C. §§ 2000e to 2000e-15 (1982).

325. *Southern Methodist University*, 599 F.2d at 712 (quoting *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974)).

326. *Southern Methodist University*, 599 F.2d at 713 (footnotes omitted). The court was rightly concerned about the fairness of allowing “accusers” to keep their identities confidential while publicly naming private defendants accused of serious violations of federal law. The law firms, however, had not requested pseudonymity. Had they done so, the court then could have analyzed the firms’ claim to pseudonymity on *its* merits. That approach would have been preferable to denying plaintiff pseudonymity to avoid asymmetry.

327. *Id.*

328. *Id.* at 713 (quoting *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974)).

329. At the same time, the court recognized that, without a protective order, women would be reluctant to join or work for the co-plaintiff association of women law students for

The Fifth Circuit overstated the shared characteristics of the cases allowing pseudonymity. They did not all involve disclosure of personal information of the utmost intimacy,³³⁰ and many did not involve an admission that plaintiff had engaged, or wished to engage, in prohibited conduct.³³¹ The fact that similarly situated plaintiffs in other cases were less fearful and therefore dared to sue under their own names, has not been determinative.³³² Almost all of the cases allowing pseudonymity, however, have involved challenges to a governmental body or activity.³³³

Lawyers A-D's claims to pseudonymity can be analyzed under the proposed balancing approach. Plaintiffs sought to keep their identities confidential because they were concerned about their careers, their desirability as employees and ultimately as partners, and their professional growth. In nearly all of the cases in which pseudonymity has been granted, the courts have protected social, psychological, and economic interests;³³⁴ they have not always demanded proof of threats to the plaintiffs' physical security nor have they always required threats to privacy rights. Federal courts freely use protective orders to guard against economic injuries in other kinds of cases.³³⁵ Moreover, in cases that have involved the constitutional right of associational privacy,³³⁶ the Supreme

fear of retaliatory discrimination. The court prohibited defendant counsel from disclosing membership information to anyone other than two named partners of the defendant law firm. The two partners could release that information only upon the court's order. *Southern Methodist University*, 599 F.2d at 713-14.

330. See, for example, the cases involving juveniles accused of delinquency, discussed *supra* notes 276-89 & accompanying text; cases involving adults accused of unprofessional conduct, discussed *supra* notes 246-61 & accompanying text; and cases involving drug use, discussed *supra* notes 227-45 & accompanying text.

331. See, for example, the abortion cases, discussed *supra* notes 181-205 & accompanying text; the cases involving mental illness or deficiency, discussed *supra* notes 217-26 & accompanying text; the drug use cases, discussed *supra* notes 227-45 & accompanying text; the cases involving abused, abandoned or illegitimate children, discussed *supra* notes 290-303 & accompanying text; and the cases involving public aid, discussed *supra* notes 305-14 & accompanying text.

332. See, e.g., *Campbell v. United States Dep't of Agriculture*, 515 F. Supp. 1239 (D.D.C. 1981) (one of two individual plaintiffs sued pseudonymously); *supra* text accompanying notes 305-14. Other plaintiffs have feared to bring suit in their own names alleging sex discrimination. See, e.g., *Doe v. First City Bancorp. of Tex.*, 81 F.R.D. 562 (S.D. Tex. 1978).

333. For cases involving private parties only, see, e.g., *Doe v. A Corp.*, 709 F.2d 1043, 1044 n.1 (5th Cir. 1983); *Doe v. A Corp.*, 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd sub nom. Hall v. A Corp.*, 453 F.2d 1375 (2d Cir. 1972); see *infra* notes 357-65.

334. These interests were endangered in the cases concerning abortion, homosexuality and transsexuality, mental illness or deficiency, drug use, criminal and unprofessional conduct, juveniles, and public aid.

335. In many cases the courts have entered protective orders to guard against the disclosure of trade secrets in order to avoid economic injury. See, e.g., cases cited *supra* note 112.

336. See generally Steinman, *Privacy of Association: A Burgeoning Privilege in Civil Discovery*, 17 HARV. C.R.-C.L. L. REV. 355, 359-71 (1982).

Court has recognized that the danger of economic reprisal should be weighed against the interests supporting compelled disclosure of identifying information.³³⁷ Associational privacy cases almost always have involved fears of harassment and reprisal that were not merely economic.³³⁸ For Lawyers A-D, however, more than mere economic ramifications were involved. The feared reprisals would also endanger their opportunity to develop as lawyers and to gain a sense of professional competence and respect. While these concerns are not as fundamental as the interest in physical security or as compelling as the interest in privacy with respect to intimate matters, they are nevertheless substantial interests in avoiding stigma and its consequences. Further, insofar as the vindication of the right not to be discriminated against depends upon allowing plaintiffs' pseudonymity, there is a public interest that supports pseudonymity.³³⁹

Competing with plaintiffs' interests in pseudonymity is the general public interest in access to litigants' identities. Because these lawyers essentially sought to sue as members of a class of women law students and lawyers and because they sought only injunctive relief, their individual identities had no special importance to the general public and, at the least, plaintiffs' interest in avoiding retaliation outweighed the bar's interest in avoiding professional relationships with them.³⁴⁰ In view of the

337. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 462-66 (1958) (Based upon the NAACP's "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," the Court found that compelled disclosure of its Alabama membership was unconstitutional.); cf. *National Org. for Women v. Sperry Rand Corp.*, 88 F.R.D. 272 (D. Conn. 1980) (The National Organization for Women ("NOW") alleged sex and race discrimination. In granting defendant's motion to compel disclosure of NOW's branch membership list, the court belittled the retaliation NOW members feared—removal of job duties, sabotage of work, and denigration of plaintiffs' character and competence. The court did, however, prohibit defendant's counsel from communicating the information to anyone except upon court order.) For further discussion of this case, see Steinman, *supra* note 336, at 421-24.

338. See Steinman, *supra* note 336, at 359-371, 401-27.

339. This public interest may be slight, however, given the number of Title VII cases brought by named plaintiffs and the ability of the EEOC to sue alleged discriminators. 42 U.S.C. §§ 2000e to 2000e-15 (1982).

340. Indeed, the Fifth Circuit seems to have conceded as much by restricting the dissemination of the names of the women law students whose association initially commenced the lawsuit. See *supra* note 329. The defendants' reasons for opposing confidentiality are unclear. Perhaps they resented the inequality of being publicly charged with sex discrimination by anonymous plaintiffs, or perhaps they felt that their ability to defend themselves in these actions would be impaired if the court ordered the tightly restricted disclosure of identities that plaintiffs sought. Brief for Appellee at 23-26, *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 2d 707 (5th Cir. 1979). Defendants were concerned that if their lawyers could not disclose the identities of appellants A and B, they would be unable to

plaintiffs' interest in confidentiality and the weakness of the interests in unrestricted disclosure, the Fifth Circuit may have erred in disallowing the use of fictitious names. Given its other rulings, however, the court may have been influenced by the fact that the Association was able to continue the suit for the benefit of all women, including Lawyers A-D.³⁴¹

Fear of Expressing Unpopular Political or Social Views

In some cases, plaintiffs sought to sue pseudonymously because they feared reprisal based on their political or social views. The *Southern Methodist University* case might fall into this category. The prime example of such a case, however, is *Doe v. Stegall*.³⁴² In *Stegall*, the Fifth Circuit decided that a mother and her children could sue under fictitious names to challenge the constitutionality of the daily broadcasting of religious ceremonies over the public address system at the children's school.³⁴³ Plaintiffs agreed to disclose their identities to the defendants and to the court in order to establish standing and to facilitate discovery.³⁴⁴ They sought to keep their identities confidential only from the general public because they feared harassment and violence. Plaintiffs furnished the court with documents to demonstrate the reasonableness of their fears.³⁴⁵

The Fifth Circuit held that the trial court had erred in concluding that it lacked jurisdiction to hear the case absent public identification of

sufficiently investigate and fully prepare the defense. It is possible, however, that defendants wanted to see those who had dared to accuse them pay a professional price.

341. In *Free Mkt. Compensation v. Commodity Exch., Inc.*, 98 F.R.D. 311 (S.D.N.Y. 1983), the court followed *Southern Methodist University* in refusing to allow a John Doe plaintiff to be added. The court, stressing that matters of a sensitive and highly personal nature were not involved, held that the fear that Doe's ability to continue supplying confidential information would be compromised did not outweigh the public's interest in disclosure. *Id.* at 313. In view of the allegations of securities fraud and manipulation against the publicly identified defendants, the court found Doe's desire to avoid professional embarrassment and economic loss to be insufficient grounds for allowing pseudonymity. *Id.* Finally, though Doe was prepared to identify himself to the court and to defendants' counsel under protective order, the court found that the pseudonym might frustrate the defendant's ability to make discovery and to establish defenses, privileges, and counterclaims, and might cause problems in determining the judgment's res judicata effects. *Id.*

For another case in which plaintiffs sought pseudonymity in order to avoid retaliation for their lawsuit, see *Doe v. Hodgson*, 344 F. Supp. 964, 969 n.7 (S.D.N.Y. 1972) (Migrant agricultural laborers challenged legislative exclusions of benefits and protections from agricultural workers.), *aff'd*, 478 F.2d 537 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973).

342. 653 F.2d 180 (5th Cir. 1981).

343. *Id.* at 181-82.

344. *Id.* at 182 & n.5.

345. *Id.* at 181, 182-83 & n.6.

the plaintiffs.³⁴⁶ The court recognized the limitations of its *Southern Methodist University* decision, and rejected a rigid three-pronged test, saying that *Southern Methodist University* never purported to establish its three "common factors" as prerequisites to bringing a pseudonymous suit.³⁴⁷ The court instead relied on the confluence of several factors. First, plaintiffs challenged governmental activity. Second, plaintiffs' complaint concerned a "quintessentially private matter"—religion. Third, by revealing their personal beliefs and practices through their lawsuit, plaintiffs had invited serious opprobrium and had demonstrated the likelihood of harassment or even violent reprisals if their identities were publicly disclosed. Finally, the plaintiffs were children, and thus were both especially vulnerable and members of a class of litigants that the state shielded from identification in various circumstances.³⁴⁸ The court concluded that, under these circumstances, the Does should have been permitted to sue under fictitious names, for their interests outweighed the public's right to know their identity.³⁴⁹

Stegall is noteworthy, if for no other reason than that the court recognized the first amendment public interest in disclosure of litigants' identities, and explicitly balanced it against the plaintiffs' interests in privacy and security. Even if the dissent correctly concluded that plaintiffs' privacy of religious beliefs was minimally threatened,³⁵⁰ plaintiffs' stance in the litigation threatened their social and physical welfare, and that

346. *Id.* at 184-85.

347. *Id.* at 185; see *supra* note 326 & accompanying text.

348. *Id.* at 186.

349. *Id.*; accord *Doe v. Aldine Indep. School Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982) (court allowed a pseudonymously filed suit in challenge to recitation of prayer on school district property).

Stegall was a rare pseudonymity case because it provoked a dissent. Judge Gee questioned many of the premises upon which the majority opinion was based. He believed that the record of threats was inadequate, even taking into account the "inherent difficulty of making such proof while preserving one's anonymity." *Stegall*, 653 F.2d at 187 (Gee, J., dissenting). He argued that plaintiffs had disclosed nothing of their private religious beliefs "beyond a belief that the Constitution forbids what the defendants are requiring pupils to do." *Id.* at 188. Finally, he argued that the children were not necessary plaintiffs at all, because their parents had standing to complain of the alleged constitutional violations. Judge Gee acknowledged, however, that "as a practical matter, if parents incur sufficient opprobrium, it may well be that the children may suffer, whether made plaintiffs in the suit or not." *Id.*

While Judge Gee criticized the majority for offering no objective formulas for deciding claims to pseudonymity, asserting that "it is just such formulas, or at least a sketching of their outlines, that we sit to provide," *id.*, he offered even less guidance. Wavering on whether the courts should require people to stand up to such menaces as plaintiffs feared, as both the price and the seedbed of fortitude, *id.* at 189, Judge Gee concluded: "I need not decide; in my view, the showing made here is insufficient on any mode of reckoning." *Id.*

350. See *supra* note 349.

alone could justify pseudonymity.³⁵¹ The suit raised important constitutional issues that it was in the public interest for the courts to address, and there were no strong public interests in knowing plaintiffs' identities, as their claim did not depend on facts unique to plaintiffs' situation. The majority's conclusion seems correct in light of the reduced public interest in plaintiffs' identities and the plaintiffs' showing of threatened harm.³⁵²

Another example of pseudonymous litigation based on fears of retaliation for unpopular views is *Doe v. Rostker*.³⁵³ Plaintiffs, who had complied with draft registration requirements, alleged that the presidential proclamation ordering the draft violated various federal statutes, and requested expungement of their names from registration records. The court said that "the common thread running through [the] cases is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure."³⁵⁴ The court found neither present here. Moreover, this was not a case in which disclosure of identity would vitiate the interests plaintiffs sought to protect. If they prevailed on the merits, plaintiffs' names would be expunged from Selective Service records; if they lost, their claim to anonymity from the Selective Service System would be defeated and their names would be known. The court also noted defendants' interest in knowing who was suing them.³⁵⁵ The court rejected plaintiffs' argument that they feared "reprisals which may jeopardize their attempts to obtain conscientious objector status," because such reprisals were speculative, prospective, and remediable should they occur.³⁵⁶

It is difficult to assess whether the court fairly evaluated plaintiffs' reasons for seeking pseudonymity. They argued in part that the challenged presidential proclamation resulted in government possession of information to which it had no right, in violation of plaintiffs' rights of privacy. It is unclear whether the expungement of their names from the

351. The social and physical welfare of plaintiffs, influential factors in nearly all pseudonymous litigation, played an especially significant role in allowing juveniles accused of delinquency and persons seeking the protection of the United States Witness Protection Program, 18 U.S.C. § 3481 (1982), to use pseudonyms. See also *Doe v. Lally*, 467 F. Supp. 1339 (D. Md. 1979) (homosexual rape of prisoner); *Glover v. Johnson*, 85 F.R.D. 1 (E.D. Mich. 1977) (prison inmates' fear of retaliation for participating in lawsuit).

352. See text accompanying note 197; see also *Doe v. Martin*, 404 F. Supp. 753 (D.D.C. 1975) (Doe and the Socialist Workers' party alleged that disclosure requirements of campaign finance reform act would subject named contributors to governmental and private harassment. The opinion contains no discussion of why Doe was permitted to sue pseudonymously.).

353. 89 F.R.D. 158 (N.D. Cal. 1981).

354. *Id.* at 161.

355. *Id.* at 161-62.

356. *Id.* at 162.

Selective Service records would deprive the government of that information. It is possible that, by virtue of being denied pseudonymity and of being subject to discovery, plaintiffs would be forced to disclose the very information they sought to keep from the government. Similarly, it is unclear whether plaintiffs would have an adequate remedy if they ultimately were denied conscientious objector status and suspected foul play. Inasmuch as plaintiffs were asserting public rights, dropping the lawsuit to avoid such retaliation would not serve the public interest. In addition, although the court asserted that the government had a strong interest in knowing who challenged the proclamation requiring certain males to register, it is unclear what relevance that information would have to the merits of plaintiffs' claims.³⁵⁷

In cases of this sort, the plaintiffs are concerned primarily about physical and other reprisals, unless they happen to be suing to preserve privacy interests.³⁵⁸ Consequently, in evaluating the substantiality of the basis for pseudonymity, the courts should look for evidence showing a reasonable probability that plaintiffs will suffer significant reprisals if they are denied pseudonymity.³⁵⁹ If the plaintiffs raise purely legal issues, that tends to weaken the public interest in access to their names, but the subject matter of the litigation is likely to be of particular interest to someone; otherwise, feelings would not be running so high that plaintiffs would have reasonable grounds to fear reprisal. In evaluating whether plaintiffs' interests override the interests in access, the courts also should be vigilant in examining the motivations of those who oppose pseudonymity because, in cases such as these, they may seek to harass the plaintiffs and to force them to drop their lawsuit to avoid identification.

357. In a final set of cases in which pseudonymity was sought because of the "unpopularity" of plaintiffs' activities, persons promised protection under the federal government's Witness Protection Program, 18 U.S.C. § 3481 (1982), have sued pseudonymously to obtain the promised protection. Their need for pseudonymity stems from the same basis as their acceptance into the program: substantial fears of violent retaliation for cooperation with the authorities. *Doe v. Civiletti*, 635 F.2d 88 (2d Cir. 1980); *Doe a/k/a WC0612 v. United States Witness Protection Program*, 221 Ct. Cl. 940, 941-42 (1979). The public's interest in their identities cannot be satisfied without endangering the Program and those it seeks to protect. These plaintiffs thus have "substantial cause," and the courts properly have permitted pseudonymity in these cases. The policies that support both the Witness Protection Program and pseudonymity in these cases include protecting individuals from the threat of violent reprisal to encourage individuals to testify, aiding the criminal justice system, and furthering the public interest in the suppression of organized crime. *See Franz v. United States*, 707 F.2d 582, 585-86 & 586 n.6 (D.C. Cir. 1983).

358. *See Doe v. Rostker*, 89 F.R.D. 158 (N.D. Cal. 1981) (both privacy and security at stake).

359. *See supra* notes 161, 349 & accompanying text.

Corporate Defendants

A final category of cases involves requests by defendant corporations sued by insiders to proceed pseudonymously to protect allegedly confidential information. In *Doe v. A Corporation*,³⁶⁰ for instance, a former in-house counsel, on behalf of himself and others, sued for benefits allegedly due under corporate pension and life insurance plans. The Fifth Circuit seemingly approved the district court's grant of pseudonymity: "To prevent identification of the company and the possible disclosure of confidential information concerning its affairs, the district court granted the defendant corporation's motion to seal the record; [and] require the suit to be prosecuted without revealing the name of either the lawyer or the corporation."³⁶¹

The appellate court's reasons, however, are unclear. Although the corporation had an interest in maintaining attorney-client confidentiality, the court declared that, "[a] lawyer . . . does not forfeit his rights simply because to prove them he must utilize confidential information."³⁶² Moreover, "[t]here is no social interest in allowing the corporation to conceal wrongdoing, if in fact any has occurred."³⁶³ It is possible that the court sought to facilitate confidentiality in case wrongdoing was not established. Even then, it is difficult to reconcile this result with the *Southern Methodist University*³⁶⁴ and *Stegall*³⁶⁵ cases. Intimate personal information was not at risk, governmental activity was not challenged, children were not involved, and the injuries threatened were largely economic. While the defendant was accused of violating federal and state law, the legal system has never kept the identities of those so accused confidential or every lawsuit could involve a pseudonymous defendant. The parties were on an equal footing because plaintiff was given a pseudonym as well, but that appears to have been done for the protection of the defendant corporation rather than at plaintiff's request. The court could have better served the public interest by designing a system to protect the particular information in which defendant had a legitimate confi-

360. 709 F.2d 1043 (5th Cir. 1983).

361. *Id.* at 1044 n.1. The opinion does not reveal what secrets Doe learned while in defendant's employ, except for his allegation that "X Insurance Company had paid dividends to A Corporation, which A Corporation retained without disclosing their receipt to its employees or to 'the appropriate federal and state agencies.'" *Id.* at 1045.

362. *Id.* at 1050.

363. *Id.*; accord *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (that information would harm company's reputation was no reason to seal it); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (that an internal report would disclose poor management was no ground to withhold it), *cert denied*, 460 U.S. 1051 (1983).

364. 599 F.2d 707 (5th Cir. 1979); see *supra* notes 317-29 & accompanying text.

365. 653 F.2d 180 (5th Cir. 1981); see *supra* notes 342-49 & accompanying text.

dentiality interest without keeping the identity of the corporation from the public.³⁶⁶

In sum, it is entirely unclear why the court permitted the defendant corporation to avoid public identification. Although there is a long tradition of protecting sensitive commercial information, a corporation's privacy rights are weaker than those of an individual.³⁶⁷ While there may have been "substantial cause" to seal parts of depositions, to close parts of hearings when confidential information would be disclosed, and to take other similar precautions against the disclosure of confidential information, there does not appear to have been "substantial cause" for affording pseudonyms to the parties. The court's order was not narrowly tailored to protect cognizable corporate interests, and thus infringed on the public's right of access to party name.³⁶⁸

In general then, when defendant businesses seek to be sued pseudonymously, courts should apply the same balancing analysis set forth and illustrated above. The party seeking pseudonymity should establish that it has kept confidential the information it seeks to protect, and it should establish the reasonable likelihood of a serious harm should disclosure result. In this category of cases particularly, the courts should satisfy themselves that pseudonymity does not give the corporate defendant unnecessarily broad shelter from public scrutiny. It should consider the alternative of identifying the party and keeping from public scrutiny only those particular items of confidential business information that there are good reasons to protect. It should examine the corporate motivations for

366. See *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984), in which the court observed that

federal courts should not deny access to trial evidence of a bad business practice The presumption of openness plus the policy interest in protecting unsuspecting people from investing in Publicker in light of its bad business practices are not overcome by the proprietary interest of present stockholders in not losing stock value or the interest of upper-level management in escaping embarrassment.

Id. at 1074; see also *Doe v. A Corp.*, 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd sub nom. Hall v. A Corp.*, 453 F.2d 1375 (2d Cir. 1972) (Derivative and class action suit alleging fraud, breach of fiduciary duty and violations of federal securities laws, brought by attorney who acquired information while doing legal work for defendant, a publicly held corporation. The court did not discuss the use of pseudonyms.).

367. The Federal Rules of Civil Procedure can be used to protect sensitive commercial information. FED. R. CIV. P. 26(c)(7). A corporations' right of nondisclosure, however, is weaker than an individual's. *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 65-66 (1974) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.").

368. In addition to the universal baseline of public interest in party identity, the public has an interest in knowing of the defendant's allegedly bad business practices to guide its investment and its purchasing decisions. See *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984).

seeking to be sued under a pseudonym, for it may find them unworthy of support. At the same time, the court's analysis should reflect both the universal level of public interest in knowing who litigants are and the special public interests that may be present because of the interests of employees, the investing public, and the consuming public.

Summary

As demonstrated above, the single most important factor in the argument for pseudonymity is the substantiality of the bases upon which the request is grounded. Judicial attempts to define the sufficiently substantial bases for pseudonymity, however, have under-described the relevant universe. The cases granting pseudonymity have not always entailed disclosure of intimate information, illegal conduct, or other matters that invite analogous opprobrium. Nor have they always involved fears of retaliatory harassment. Similarly, they have not always sought declaratory or injunctive relief, nor have they always been against the government. Further, the cases have not always involved especially vulnerable litigants, nor would party identification always violate the very interests plaintiffs sought to vindicate. Nevertheless, one or more of these factors is present in each case.

In the future, courts must not decide automatically the pseudonymity issue based on whether a case falls into a familiar fact pattern. Courts should consider whether a party seeks to protect a substantial privacy interest, such as exists in the cases involving abortion, homosexuality, mental illness or deficiency, and juveniles. They should also consider whether a party seeks to protect a substantial interest in physical well-being, as in cases involving prison inmates, witness protection, and unpopular political or social views. There are, however, other subtler, yet substantial, bases for seeking pseudonymity. The courts have been willing to protect litigants from "stigma," even when physical violence was unlikely or highly personal matters were not involved. Such "stigma" played a part in many of the above categories, including abortion, homosexuality, mental illness or deficiency, drug use, alleged criminality and unprofessional conduct, and juvenile delinquency. The courts protected litigants from psychological injuries, ostracism, and other negative reactions, including adverse economic ramifications. The courts have not, however, forthrightly held that stigma and its consequences alone are sufficient to justify pseudonymity.³⁶⁹ Usually, the courts have not been

369. The lack of any clear judicial statements on the sufficiency of stigma and its consequences as a basis for affording pseudonymity makes the hardest cases today those that involve primarily economic effects or ostracism plus economic effects, such as Southern Methodist

forced into that position because other interests were involved: privacy, security, grand jury confidentiality, fifth amendment rights, protection from defamation, or juvenile record confidentiality.

There are important arguments *against* pseudonymity as well. There is always a public interest in access to the litigants' names, and it is impossible to quantify or to articulate precisely how much weight that interest should receive. As a practical matter, because it is amorphous, this interest generally is subordinated when a relatively concrete and immediate threat to a litigant's interests in privacy or security has been demonstrated.

This is particularly true when the plaintiff is a fungible member of a class, whether or not the suit technically is framed as a class action. Thus, when undistinguished plaintiffs challenge statutes and government policies on their face, there is little public interest in who happens to sue. In such a case, the salutary affects of public scrutiny are little influenced by public knowledge or ignorance of the plaintiff's identity. Because the decision of the case will directly affect a whole class of persons, it is relatively unlikely that judicial bias or partiality toward the plaintiff will affect the decision. Because the issues are predominately, if not entirely, legal questions of interpretation and constitutionality, the public's inability to identify the plaintiff is unlikely to affect the availability of relevant testimony. Accordingly, pseudonymity should not undermine public confidence in the administration of the law, nor should it affect the well-informed discussion of judicial matters. The first amendment right of access to litigants' identities is therefore particularly weak when plaintiffs are fungible class members, and should be subordinated to demonstrated privacy and security interests, including the avoidance of stigma.³⁷⁰

The cases also suggest when there is a greater than ordinary public interest in disclosure of a litigant's identity. Cases that involve government officials, such as judges,³⁷¹ members of Congress, or public servants in a broader sense, such as doctors³⁷² or lawyers, often are in this category. By virtue of their societal roles, such persons have a reduced expectation of privacy as to some matters because the public has a legitimate interest in their activities. Similarly, the public has a special

Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979), and Doe v. A Corp., 709 F.2d 1043 (5th Cir. 1983).

370. For these reasons, even government involvement in a lawsuit does not so increase public interest in the opponent's identity that the court must necessarily deny pseudonymity.

371. See, e.g., Doe v. United States Dep't of Justice, 93 F.R.D. 483 (D. Colo. 1982); *supra* text accompanying notes 240-43.

372. See, e.g., Doe v. Deschamps, 64 F.R.D. 652 (D. Mont. 1974) (per curiam); *supra* text accompanying notes 182-84.

interest in knowing of activities of such people that carry stigma, so that it can vote them out of office, withhold patronage, or take other appropriate action. The public corporation has a similarly reduced expectation of privacy and the investing and consuming public has a special interest in knowing of allegedly improper corporate activities in order to make well-informed investment and purchasing decisions.³⁷³

There is also an unusually great public interest in the litigant's identity when the litigant poses a threat to the community. Thus, there is a public interest in knowing who is likely to be physically dangerous because of drug addiction³⁷⁴ or mental illness, and in knowing who has allegedly acted criminally or in violation of professional ethics.³⁷⁵ Beyond societal consensus of danger reflected in laws and ethical canons, the courts should avoid judging who is "morally" dangerous. Given the diversity of views on immorality, the courts should not find a public interest in a litigant's identity based on the argument that he poses a moral danger to the community. At the extreme, there is arguably a greater public interest in knowing the identity of defendants than of plaintiffs, because only defendants are accused of wrongdoing, and wrongdoers pose varying degrees of threat to the public.

Despite the absence of bright line tests, this effort to isolate the most substantial bases for pseudonymity and the characteristics of the weakest and strongest cases for public access to litigants' names should assist the courts in their efforts to grapple with these issues.

The Need for Procedures

Although the main task of this Article is substantive analysis of pseudonymous litigation, the procedural aspect of that issue should not be ignored. The Federal Rules of Civil Procedure do not address it. More surprisingly, in view of the number of "Doe" cases that have been filed over the past fifteen years, it appears that the federal courts have promulgated no local rules to govern the matter.³⁷⁶

Given the volume of cases affected, clear procedures should be es-

373. See, e.g., *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983); *supra* text accompanying notes 357-65

374. See *supra* text accompanying notes 237-39.

375. See *supra* text accompanying notes 256-61, 271.

376. In June 1984, the author wrote to a court in each federal judicial district and to each federal circuit court of appeals asking for information concerning the procedures used when litigants seek to sue pseudonymously, and whether these procedures were established by formal local rules or informal procedures. None of the forty-eight responding courts indicated that they had directly pertinent local rules (copy of letters on file with *The Hastings Law Journal*). Some court rules disallow the filing of civil complaints by or against fictitiously

established governing pseudonymity requests.³⁷⁷ The author recommends that, when a plaintiff seeks to sue pseudonymously, the complaint and summons should be captioned with a fictitious name substituted for plaintiff's true name, and that the same fictitious name should be used in the body of the pleading and summons. At the time the complaint is filed, or shortly thereafter,³⁷⁸ plaintiff should file and serve on all other parties to the litigation a motion requesting leave to proceed pseudonymously. In order to enable the court to balance plaintiff's interests in confidentiality against the public interest in access, plaintiff's motion should be accompanied by affidavits containing the facts supporting pseudonymity, and the facts necessary to establish standing and the existence of a case or controversy, and by a memorandum of law citing pertinent legal precedent.³⁷⁹

If plaintiff has no objection to disclosing his identity to co-plaintiffs or to defendants and their counsel, plaintiff should so indicate in the motion. Plaintiff's motion should request a protective order specifying the persons entitled to know plaintiff's identity and prohibiting them from further disseminating the information. If plaintiff's identity is disclosed to any other litigant, litigant's counsel, or the court in a filed document, plaintiff should move that that document be kept under seal. If plaintiff objects to disclosing his identity either to other litigants and their counsel, or to both the adversaries and the court, plaintiff should again so indicate in the initial motion and memorandum of law.

The other parties should then file papers indicating their agreement with or opposition to the relief plaintiff has requested. Insofar as they

named parties unless otherwise ordered. *E.g.*, D. ARIZ. R. 10(d); S.D. CAL. R. 200-6 (in diversity cases).

377. Other possible approaches include those suggested by the courts in *Roe v. New York*, 49 F.R.D. 279 (S.D.N.Y. 1970) (recommending that plaintiff file in true name, and then seek to amend or seek protective orders); *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508 (1959) (recommending that, before the case is filed, plaintiff should secure the court's consent to pseudonymous filing), *appeal dismissed sub nom. Poe v. Ullman*, 367 U.S. 497 (1961). The former risks disclosure, both in the interim and in the event pseudonymity is denied. As to the latter, see *infra* note 375.

378. Plaintiff's complaint should be filed before, rather than after, plaintiff asks the court's permission to sue pseudonymously, because otherwise no civil action has been commenced and the court lacks jurisdiction even to enter an order allowing or disallowing pseudonymity. See FED. R. CIV. P. 3. The author rejects the court's position in *Roe v. New York* that no action is commenced by the filing of such a complaint. *Roe v. New York*, 49 F.D.R. 279, 282 (S.D.N.Y. 1970).

379. All of the federal cases discussed in this Article involved "federal question" jurisdiction, 28 U.S.C. § 1331 (1982). If a plaintiff needed to invoke diversity jurisdiction, *id.* § 1332, pseudonymity would pose the additional problem of interfering with the defendant's ability to discover and the court's ability to ascertain plaintiff's citizenship. See *supra* note 2.

oppose pseudonymity, the parties should file sworn factual material and memoranda of law in support of their position. The court should also permit the press and public to oppose pseudonymity and any related orders proscribing dissemination of identifying information to the public or press.³⁸⁰

The court should then rule on plaintiff's motion, entering appropriate orders supported by findings of fact and conclusions of law adequate to justify its decisions and sufficient for appellate review. If the trial court denies plaintiff permission to sue pseudonymously, it should order dismissal without prejudice and with leave to amend the complaint to substitute plaintiff's true name.

If a defendant seeks to be sued pseudonymously,³⁸¹ he should move that the original complaint and summons be put under seal, that an amended complaint and summons be filed substituting a pseudonym for his true name, and that a protective order issue prohibiting dissemination of defendant's identity by the other parties and their counsel. Supporting affidavits and legal memoranda should accompany the motion. From this point on, the procedures described above should apply except that, if the court disallows pseudonymity, the action should proceed. In this circumstance, it is too late to prevent the other litigants and the court from learning defendant's identity, so only pseudonymity with respect to the public is in question.³⁸²

380. This position is based on the Supreme Court's holding that, "for a case-by-case approach to be meaningful, representatives of the press and the general public must be given an opportunity to be heard on the question of their exclusion." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979)). Precisely how to afford the opportunity to be heard is an open question. In *In re Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984), the court ruled that a motion for courtroom closure should be docketed promptly in the public docket files in the court clerk's office; the public docket entries also should reflect that the motion and any supporting or opposing papers were filed under seal, the time and place of any hearing on the motion, the occurrence of such hearing, the disposition of the motion, and the fact of courtroom closure, if any. The court emphasized that it did not intend to foreclose the district courts from supplementing these procedures by such steps as notification of the news media. *Id.* at 103. The same procedures could be followed when a litigant moves for leave to sue pseudonymously.

381. *See supra* note 102.

382. A court might have to decide more than once whether to permit an action to proceed pseudonymously, first on the mere "cause" standard and then on the "substantial cause" standard. *See supra* notes 157, 161-63 & accompanying text.

There is ordinarily no significant problem with appeals. The Federal Rules of Appellate Procedure require that the notice of appeal "specify the party or parties taking the appeal," FED. R. APP. P. 3(c), and that "[a]n appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title." *Id.* Rule 12(a). As construed, these Rules allow parties who were permitted to use fictitious names in the trial court to continue to use them on appeal. When courts of appeal have been asked to

Conclusion

The public right of access to judicial proceedings and records is essential to public knowledge about the court system and how it handles challenges to legislative and executive action. These rights of access have salutary effects upon judicial administration as well. Nevertheless, these rights are qualified and sometimes yield to other interests.

This Article has demonstrated that pseudonymous litigation is in tension with the public's right of access. It advocates the use of a multi-factor balancing test, applied on a case by case basis, to determine when litigants should be permitted to sue pseudonymously. The courts should evaluate the grounds urged for keeping a litigant's identity confidential in light of any public interest in confidentiality and in the litigation. Pseudonymity should be permitted only when a litigant demonstrates a reasonable probability of significant injury to important privacy or security interests, defined to encompass physical, psychological, and economic well-being, which outweighs the public's interest in access. That public interest may be the usual minimum of interest in litigant identity, or it may be greater because of the subject matter of the litigation or the societal role of the parties.

This Article also has illustrated the application of the proposed balancing test in each of the nine categories of cases in which litigants most often have sought pseudonymity in federal court. The Article articulated the justifications for allowing or disallowing pseudonymity. Based on these applications of the balancing test, the Article offered some perspective on the present state of the law and showed that the universe of cases in which pseudonymity is proper is more diverse than courts have recognized. The Article recommends that, in new situations, the courts should look beyond the superficial factual similarities and differences of prior cases to determine whether the circumstances justify pseudonymity. In particular, courts should clarify when, if ever, stigma and its consequences are sufficient to justify pseudonymity.

As requests for pseudonymity continue to confront the courts, this Article will help to guide litigants and the courts to a proper resolution of

publish opinions using pseudonyms, though a party previously had been identified, they have employed an analysis similar to the trial courts'. *E.g.*, *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980).

Similarly, although United States Supreme Court Rules require parties to the proceeding to be listed in the petition for certiorari, the notice of appeal, and jurisdictional statement, S. CT. R. 10.2, 15.1(b), 21.1(b), if pseudonyms were used below, the parties may continue to use them in the documents filed with the Supreme Court. R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* § 6.19 (5th ed. 1978).

the relevant issues. This discussion should heighten sensitivity both to the first amendment values at stake and to litigants' competing interests in privacy and security, and give the courts assistance in their effort to reconcile these values.

